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JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 24.

THE METROPOLITAN RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA,
Defendant in Error.

In Error to the Supreme Court of the District of Columbia.

OPINION

OF THE

Supreme Court of the District of Columbia, in General Term.

W. D. DAVIDGE,
NATH'L WILSON,
of Counsel for Plaintiff in Error.



Supreme Court of the District of Columbia,

GENERAL TERM.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY.
Law. No. 22,457.

THE DISTRICT OF COLUMBIA
vs.
THE METROPOLITAN RAILROAD COMPANY.
Law. No. 22,458.

Decided June 15, 1885.
Justices COX, JAMES and MERRICK sitting.

1. By the charters of the Washington & Georgetown and of the Metropolitan street railroad companies they are required to keep their tracks "for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order." *Held*, That this language involved the obligation to construct a pavement where one did not exist on the line of their roads.
2. The authorities of the District have the right to prescribe the material of which this pavement shall be composed, and if a pavement has already been constructed, they may direct it to be removed and a pavement of a different character substituted.
3. Whenever the District authorities direct the grade of the street or character of the pavement to be changed, it becomes the duty of the companies to conform their roads to the change.
4. And this obligation does not depend upon notice to the companies, it is incurred the moment they have knowledge that the change is begun or contemplated.
5. The District, on the failure of the companies to do this work, did the work itself, and thereupon issued certificates of indebtedness for the cost thereof against the roads. These certificates it sold to third parties. *Held*, That the District had no authority to issue such certificates, and the purchase of them by third parties gave the latter no right of action against the companies, nor did it discharge the liability of the companies to the District. Whether the District would be responsible to the purchasers for the money paid for these certificates is a question which cannot concern the companies.
6. The District is responsible for the condition of its streets, and in this respect stands in the relation of surety for the performance by the companies of their obligation to keep their roads in good condition; hence, on default being made, it may at once do the work and sue in *assumpsit* for the cost, on the same theory that a surety who discharges the defaulted obligation of his principal, does so upon his implied request and upon his implied promise to indemnify.

The CASE is stated in the opinion.

A. G. RIDDLE and HENRY E. DAVIS for plaintiff.
W. D. DAVIDGE and NATH'L WILSON for Metropolitan Railroad.
ENOCH TOTTEN for Washington & Georgetown Railroad.

Mr. Justice Cox delivered the opinion of the Court.

These were separate actions brought by the District of Columbia against the Washington and Georgetown Railroad Company and the Metropolitan Railroad Company respectively.

The charters of these two companies were passed respectively in the years 1862 and 1864. The charter of the Washington & Georgetown Railroad Company contains, in its fourth and fifth sections, the following provisions:

SEC. 4. "That the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order without expense to the United States or to the cities of Washington and Georgetown."

SEC. 5. "That nothing in this act shall prevent the Government, at any time, at their option, from altering the grade or otherwise improving Pennsylvania Avenue and such other avenues and streets as may be occupied by said roads, or the cities of Washington and Georgetown from so altering or improving such streets and avenues as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform it to such altered grade and pavements."

The provisions of the fourth and fifth sections of the charter of the Metropolitan Railroad Company are substantially the same as those of the Washington & Georgetown.

The declaration in each case sets forth the defendant's charter, and in substance avers that the defendant failed to execute the work required of it by its charter, and the plaintiff was therefore compelled to cause the work to be executed at its expense, and hence a right of action has arisen to recover that expense from the defendant.

In the course of the argument, the first question that was presented was, whether the obligation to keep the road at all times well paved and in good condition involved the obligation to construct the pavement where one did not originally exist. We are unable to see how that obligation can be fulfilled, of keeping the streets well paved, without constructing a pavement where one

did not exist, and substantially that obligation was finally conceded in the course of the argument.

It was also conceded—in fact it could not be avoided, because the language of the law is too explicit—that when a change of grade was ordered by the authorities of the District, it became the duty of the defendant company to conform its road to that grade, and also to reconstruct its pavement in conformity with it.

The first really serious controverted question is whether the authorities of the District, who at that time were represented by the Board of Public Works, had a right to prescribe the nature of the material of which this pavement should be composed; so that if a pavement had already been constructed before the time of the Board of Public Works, whether it could ordain that it should be removed and a pavement of a different character substituted.

Before these charters were passed the authority of the city of Washington was derived from its charters of 1812 and 1820, and under those charters, the power was vested in the corporate authorities to cause the sidewalks and carriageways of the different streets to be paved upon the application of the abutting proprietors, and to charge the entire cost of the work to them. There was no restriction whatever; the corporate authorities were given control over the whole subject of pavements, including the grading, the material and everything else.

Excepting the entrance into the city, allowed by its charter to the Baltimore & Ohio Railroad Company, the granting of these two charters to the city railways was the first instance in the history of the city, probably, in which a private corporation was allowed to occupy for its business any part of the public highway. It is to us inconceivable that such corporations should be allowed an uncontrolled discretion as to material, or as to any other question attending the exercise of this power. Here was the general control of the subject vested in the municipal corporation, and afterwards a private corporation was authorized to occupy a part of the public streets and the obligation imposed upon it of keeping that part well paved and in good condition. I say it is inconceivable that an uncontrolled discretion could have been intended to be vested in this private corporation. Naturally a collision would arise between this corporation—this private

body—and the public authorities of the town upon this identical question, and the power must be lodged somewhere of determining of what material a street pavement should be composed. Now, we should expect, before examining the law, to find somewhere that the power of the private body was subjected to some public control, and looking at the charter, with this conviction, or, as you may call it, this prepossession, we find that a clause of the first section provides: "That the use and *maintenance* of said road shall be subject to the municipal regulations of the cities of Washington and Georgetown, respectively, within their several corporate limits," &c. Perhaps the term use might be limited to the mere service of transporting passengers. But the *maintenance* of the road involves more; it involves the maintaining or keeping it, and applies as well to the construction of the road as to the maintenance of it. It seems to us that to subject the maintenance of the road to the municipal regulations subjects the whole question of construction to the general control of the public authorities. But, going further, we find, in section 5, that it is enacted: "That nothing in this act shall prevent * * * the cities of Washington and Georgetown from so altering or improving the streets and avenues;" and then it is declared to "be the duty of said company to change their said railroad so as to conform to such altered grade and pavements." The word "such," of course, refers to an antecedent, and as the term "pavements" had not previously been used in the statute, it was evidently included in the general term "improvements." That is to say, that nothing in the act should prevent the Government or the cities from altering the grade or otherwise improving the streets and avenues by new pavements or what not, and that then it should be the duty of the company to change the roadways to conform to such grade and pavement. Now, taking this in connection with the previous section that imposed upon the defendant company the duty of keeping the tracks well paved, and the requirements of this section that whenever the grade should be changed they were required to conform their road to the new pavement, it seems to us that a fair construction is that it devolves upon the corporate authorities the duty to prescribe the manner in which this new pavement should be constructed by the company. Then, in 1871, while this was the relation be-

tween these private corporations and the corporations of the two cities, came the act which abolished the late corporate authority and established a new government for the District of Columbia, by which, in the 37th section thereof, is enacted, "That the Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues," &c. Could language be more comprehensive than this? There might be a question whether language more comprehensive than that contained in the charters of the city, could affect the chartered rights of the private corporations, already vested in them; but, as we have already expressed the opinion that the corporate authorities of Washington and Georgetown had ample control of the subject, we think it only necessary for us to say that that control is vested in the new body, to wit, the Board of Public Works, and, therefore, we hold that that board had the right, in ordaining improvements and altering the grade, to prescribe the materials of which the entire new street should be constructed.

The main point relied upon in this case by the defence in argument is, that the obligation of the companies was to construct these pavements only upon notice and demand that they should do so, and that they were not in default until that time, and that the District of Columbia authorities had no right to do that work and charge the cost to the defendant unless they had first been in default and failed to discharge their duty.

Now, that will depend somewhat also upon the construction of the charters of the two companies. Repeating the language of section 5:

"That nothing in this act shall prevent the Government, at any time, at their option, from altering the grade or otherwise improving Pennsylvania avenue and such other avenues and streets as may be occupied by said roads, or the cities of Washington and Georgetown from so altering or improving such streets and avenues as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such altered grade and pavements."

We see that it prescribes, not that it shall be their duty *on demand and notice*, but *upon the happening of an event*,

and that event simply was the alteration of the street by the corporate authorities or by the United States.

Now, it is true that when a person is bound by a contract to do a certain thing upon the happening of an event, the knowledge of which is confined to the other party to the contract, he is not in default for not doing the thing until that knowledge is communicated to him. But in this case it would be preposterous to maintain that these companies did not have ample knowledge and *notice*, in that sense, of the proposed progressive improvements and changes. The law does not require that they shall execute the work upon being notified and demand being made upon them to do it, but in the event of a change being made by the United States or by the District authorities. All that is necessary for them to have is knowledge that the proposed improvement is begun or contemplated. That knowledge may be derived from any other source than the corporation. The first stroke of a pick in the streets would be sufficient to bring knowledge home to them. The first block of wood pavement, or the first wheelbarrow of dirt. placed along the street or thrown into it, would be sufficient to communicate a knowledge which would raise the obligation to conform to the proposed alteration.

Now, taking up first the case of the Washington & Georgetown Railroad Company, it is very easy to find in the record—both in the correspondence and in the testimony—ample evidence of knowledge on the part of the defendant that the work was going on. We find, for instance, page 59 of the record, under date of April 9, 1872, a notice from the vice-president of the Board of Public Works to the president of the railroad company, that—

"The board are now paving the carriageway and east side of Centre Market from canal bridge to Pennsylvania avenue with treated wood. It is noticed that you are paving between and in the railroad tracks with cobblestone. The board intend to have the whole carriageway paved alike, and have so directed the contractor."

Again, another letter under date of May 20, 1872:

"Mr. L. S. Filbert has been directed to remove the cobble-stones from between the tracks of the railroad on New York avenue, between 14th and 15th streets, and at the intersection of New York avenue and 14th, and to pave the same with the Scharfe pavement, the same as the rest of the street," &c.

So in the testimony on page 67:

"The plaintiff then called as a witness the superintendent of the defendant, and by him gave evidence tending to prove that he was such superintendent during the years 1871, 1872, 1873, and 1874, and that when the pavements mentioned in the declaration were laid along the line of the railroad of the defendant, in the streets and avenues mentioned in the declaration, he knew of the laying of such pavements, and that the cars of the defendant, in charge of its conductors and drivers, were running along and over the said streets and avenues before and during the progress of said work, and that the grade of defendant's railroad was, from time to time, by it changed and altered, as occasion required, during the progress of said work so as to conform to the grade established by the plaintiff, and the space between the exterior rails of the defendant's railroad was, when the grade was changed, paved by it while the plaintiff was improving the streets and avenues mentioned in the declaration."

Perhaps the most conclusive fact, however, upon this question is, that the railroad company, claiming that it had the right to lay this pavement, and that the District had not the right to do it, filed its bill in this court to enjoin the District from laying the pavement between the exterior rails of its two tracks, and obtained an injunction against it, and then actually did the work between its rails which the Board of Public Works required to be done. This action is brought against this company, not for that work, but for the work of laying the pavement between the exterior rails and a line two feet outside of them on each side of the double tracks, that part of the work which the statute required the company to do and which it did not perform, leaving that to be done by the District; the work between the rails was executed by the company itself.

Now, of course, this very proceeding to enjoin the District from executing the work from between the rails is proof demonstrative that the company was well advised of the work that the board had directed to be done. Knowing of that, then, and actually doing the work within the exterior rails, the company simply failed to do the work required of them between the exterior rails and a line two feet outside. They never offered to do that, as the evidence shows, but acquiesced in the execution of that work by the District authorities.

Here, then, is proof of an omission or failure on the part of the defendant to do the work, if an omission or default is necessary to give a right to the District, on default, to execute the work and charge the cost to the defendant. The ground upon which that right is rested will be considered a little further on.

Another point made by the defence is, that the District authorities proceeded upon the theory that the railroad company had not the right to do this work between the rails, but that the District had the right, and it was their duty to execute the work itself. It is not claimed that the District authorities—the Board of Public Works—claimed that they had a right, or admitted that it was their duty, to do this at the expense of the District ultimately, but simply that they had a right to do the work in the first instance, and at the expense of the defendant. That they expected the defendant to pay for it is very clear from the whole of the testimony.

It appears from an abstract from the minutes of the Board of Public Works, under date of August 21, 1872, that Mr. Riker, the president of the defendant company, was at one time personally present before the board, and this took place:

"Mr. Riker *et al.*, representing the W. & G. R. R. Co., called upon the board in relation to the track on Pennsylvania avenue east, and were informed that the board would not consent to have the track remain in the centre of the street as at present, but would insist upon its being removed to either side of the park from 1st to 8th street east. The board said that, so far as they were concerned, they were inclined to assess the property of the railroad company in the same manner as that of private individuals were, under the law, if it could be done."

Immediately after the execution of the work, the Board of Public Works issued certificates of indebtedness against the property of the company. What they did claim was, that having this entire control over the streets, and having a responsibility for their condition, they must do the work in the first instance, but charge it to defendants.

But it is claimed that this was a groundless pretence upon the part of the board, and that they had no right really to interfere with the companies in the execution of the work, that they really took it out of their hands to do the work, which the statute required them to do, and pre-

vented them from performing their contract; in other words, it is insisted that the defendants were not in default. Now, it is true if one party to a contract prevents the other party from performing his part of it, it does not lie in his mouth to claim a default. If the District authorities, by setting up this claim, prevented the defendant from doing the work, perhaps there might be some ground upon the part of the defence for resisting, at least, the claim to the extent to which it is made by the District authorities. Did this claim upon the part of the District prevent either of the defendants from doing the work which the statute required them to execute? This is answered in the injunction proceedings to which I have already referred.

The Washington & Georgetown Railroad Company, denying the right of the District authorities to do the work, obtained an injunction against the Board of Public Works, preventing them from doing the work between the exterior rails. Therefore it is plain that the claim of the District authorities did not prevent the company from doing the work. The very contrary was established by the case in question. They did the work to the extent to which they asserted the right to do it, that they desired to do it, but not to the extent to which the law imposed the duty upon them to do it.

In the case of the Metropolitan Railroad Company, there was no effort made to interfere with the District authorities, but the latter were allowed tacitly to go on and do the whole of the work.

In the case of the Washington & Georgetown Railroad Company, the District was prevented from doing the work between the rails, but the company tacitly acquiesced in the execution of the work outside of the rails. It is therefore plain, as it seems to us, that this position taken by the District did not prevent the defendant from executing its duty, and therefore was not a discharge and did not prevent it from being in default.

Another question is made as to the effect of the acts of Congress of June 19, 1878, and June 27, 1879, which are said to ratify the assessments made by the Board of Public Works. It is said that the Board of Public Works, in executing this work, or a part of the work, undertook to issue certificates of indebtedness against the property of the railway company, and also that in some instances

the intent with which it is done; whether the debt is paid and extinguished as the debt of the maker or not. He may go and voluntarily pay it, but if he does pay it with a view of holding it for himself, the maker's obligation is not discharged and the new holder has a right to sue him. That was the case decided by the Supreme Court of the United States in the case of the *Freedman's Savings and Trust Company* v. *Dodge*, 93 U. S. 379. Now, when these certificates were assigned to the First National Bank, it was not the intention of either of these parties that the obligation of the company to pay the money should be extinguished. Not at all. The District assigned that obligation to the First National Bank, to be held by the latter on its own account, and clearly it did not extinguish the indebtedness of the defendant.

It is now agreed upon all hands, however, that the Board of Public Works were in error in reference to their powers, and that they had no right to issue any such certificate as was issued by them against the property of the defendant; that it gave nothing to the First National Bank; that it did not give to the bank a right of action against the defendant, nor did the certificate constitute a charge upon the property of the defendant; that the District got the money of the First National Bank for nothing; that nothing was acquired by the First National Bank, and that, therefore, nothing was parted with by the District. Now, whether the First National Bank can recover that money from the District, as for money paid under a mistake or paid for a consideration that has failed, is a question that does not concern this defendant. Certainly the moral obligation exists on the part of the District to return the money to the bank, but the indebtedness of the defendant remains undischarged, and the only representative of that indebtedness is the District of Columbia. The First National Bank does not own the debt; it is still held in legal contemplation by the District, and the fact of issuing these certificates does not interfere with the right of the District to collect its debt.

It may, then, be well to state the general principles upon which this action is sustained. It is substantially an action to recover money paid, laid out and expended by the District for the use of the defendant at its special instance and request.

The general rule, as we know, is that a past and ex-

ecuted consideration is not sufficient to sustain even an express promise. Therefore if I pay money for another man, without any request from him, even his promise to pay has been held insufficient for this past executed consideration. But wherever the money is paid on the request of the party benefited, the right to recover does exist. That request may be either expressed or implied. The general rule is stated in Wait's Actions and Defences, cited on the part of the defendant in argument. At page 449 of volume 4 of that work it is said:

"An action of assumpsit for money paid by one person for another can only be maintained when it was paid in pursuance of a request from such person, express or implied, so that either an expressed or implied promise to repay the same can be predicated thereon."

Again, on page 453:

"In order to entitle a person to recover for money paid for another, a request, express or implied, must be established, or an express promise to repay it, and it may be said that, in all cases where there is a legal obligation on the part of the person paying to pay the money, the primary obligation resting upon the person for whose benefit it was paid, the law implies a request and a consequent promise that will uphold an action to recover it back."

Now, what is the relation between the District and the railroad company? In the case of *Barnes* v. *The District of Columbia*, it will be remembered that the Baltimore & Potomac Railroad Company, in crossing certain streets within the limits of the city, left a dangerous excavation, down which the plaintiff fell, and he brought an action for the injuries he had sustained. The main question there was whether the acts or neglects of the Board of Public Works were chargeable to the District, but the important principle established in that case, as applicable to this case, was that the District of Columbia is responsible for the condition of its streets, and is bound to see that they are kept in good condition, and where a railroad company is authorized to construct its road in a street or avenue, the District is the company's surety for the safe condition of its streets, and cannot be absolved from obligation.

The District of Columbia—the Board of Public Works at that time—was bound for the proper paving of the

streets, in the relation of a surety to the railroad company, on whom primarily the obligation rested. Now, in the cases which are put in the books, it is not necessary that any notice be given, or demand first made, upon the principal before the surety's right accrues to pay the debt, and then to recover the money paid on account of the principal. The very fact that the obligation has not been discharged by the principal is, in itself, sufficient to entitle the surety to pay the debt, and then reclaim the money from his principal. It is upon this ground, we think, that this defendant, not having done or offered to do the work, and the District being responsible for the condition of its streets, the District should proceed at once to do the work as surety, and then claim the money from the defendant, who is primarily responsible for the condition of the street, upon the implied promise to refund the money.

We recognize the rule which was recognized by the court at Special Term, that if the company chose to do the work they might do it, and they might have enjoined the District authorities from interfering with them, but if they fail to offer to do it, fail to notify the District authorities, then there was that condition of things which would authorize the District to do the work at its own immediate expense, but at the ultimate cost of the defendant, and to reclaim the money from the latter.

There is still another ground to be noticed in this connection. The second prayer granted by the court below was:

"The jury is instructed that, in determining whether the defendant company had notice or knowledge that the municipal authorities had directed and ordered that new pavements should be laid on the said streets and avenues, and had entered upon the performance of the said work, they are authorized to consider the testimony, to the effect that the defendant changed the grades of its track so as to conform to the grades of the new pavement; that its cars were running along the said streets and avenues while the work was progressing; and that the defendant obtained an injunction to prevent the paving of the spaces between its tracks, while the rest of the streets and avenues were being paved, with the other testimony in the case."

Now, the facts developed in this regard were, that while the District was asserting its right and duty in paving

the streets in the first instance at the cost of the defendant, the defendant came into court and objected to the District's paving between its rails, but made no objection to its paving on the outside of the rails. In other words, it tacitly consented to the right claimed by the District to pave this part of the street at the expense of the company, and this would bring the case within the rule elsewhere laid down in Wait, p. 453, as follows:

"Thus, where one pays money to satisfy a debt of a person, at his request, from such request the law would imply a promise to repay it." *Cook* v. *Linn*, 19 N. J. Law, 11; *Mills* v. *Johnson*, 23 Tex., 308.

"And this would be the case where there is no express request, but a tacit assent to such payment, as where A pays money for B when B is present, to which he does not object, unless the circumstances are such as to indicate that it was gratuitous, the law from such tacit assent will treat the money as having been paid at B's request." *Packard* v. *Lienoir*, 12 Moss, 11.

It has been claimed that this was money paid under a mistake of law, and the general rule has been insisted upon that money paid under a mistake of law cannot be recovered back. According to the view we have taken there was no mistake of law, as the District had a right to do the work and charge it to the defendant. The general rule as to money paid under a mistake of law has no application to this case. That rule is, that if I pay money under the mistaken impression that it is my duty to pay it—that it is my debt—and I discover afterwards that I was not bound to do it, I could not recover the amount so paid from the party to whom paid. Accordingly, if the District authorities had paid this money to a contractor for work that the District was not bound to do, it could not recover the money from the contractor. But if the District could not recover it from the defendant in this case, it would not be upon the ground that it was paid under a mistake of law, but because it was paid by the District without any previous request of the defendant, express or implied. But, independently of that, it is doubtful how far such a rule could have application to public officers. If a public officer undertakes to pay the public money under the mistaken impression that it was his duty to do it, it would not relieve the person really owing it from the obligation to pay it.

ing all water, gas, and service pipes to be laid prior to the paving. The necessity is more apparent, where railroad privileges have been granted, to have the timbers laid as the paving progresses, which will not only be a benefit to the city but add to the comfort of those residing upon or passing over the street. We are willing to anticipate the putting down of the sleepers and cross-ties of our contemplated extensions, provided the paving be done by your own contractor without charge against us, and should be pleased if the suggestion herein submitted should meet the favor of your board."

The District went on and laid the pavements of these streets, and at same time the company laid its stringers and cross-ties and prepared them for adaptation to the uses of the road at some future time; and it is now claimed that they ought not to be charged for that part of the pavement laid between the rails of this road and the two feet outside. Whenever the company undertook to lay down its railroad where there was no pavement, it is very clear that the obligation to keep the streets well paved involved the obligation to construct pavements anew. If the charter had authorized it to lay its road on a street already paved, and that pavement could be utilized so that the road could be laid down without destroying it, I suppose the obligation of the company would have been satisfied if it kept the existing pavement in good condition, and it would not be bound to pay the District for a pavement constructed before the road was even chartered. This case covers these two supposed cases. It is a case where the street was not paved at all when the charter was given, but where the company had elected before the pavement was laid down to extend its road into the street.

Now, there was offered in evidence an act of Congress under date of March 3, 1869, under which the company claimed that it had five years from that date within which to complete its road. However that may be, the company, as we have seen, addressed a letter to the Board of Public Works, which has already been referred to, by which they proposed to have the same benefit of the pavement that the board should lay down as if they had constructed their road simultaneously with the pavement, but they claimed at the same time not to be charged—not to be burdened with the same charge that the law would impose upon them under such circumstances. For that

purpose they proposed to divide up the process of constructing their road, so that a part of it would post date the completion of the pavement, and then claim that they did not occupy the street with their road until after the pavement had been made.

Now, it seems to us that, as this company had elected to construct their road in the street, and have the use of the pavement which the board was laying down, and complete their road after the pavement was completed, that this process of constructing their road was to be treated as one thing; that they could not divide it up so as to get the benefit of the pavement that the board was laying, and yet avoid the charge that the law imposed upon them when they constructed their road simultaneously with the work done by the board, and that when they did use and occupy the street for the purpose of their railroad, they should reimburse the board for the paving that was done for their benefit; that when Mr. Thompson said that they were willing to lay their stringers and cross-ties, "provided the paving be done without charge to us," he should have said, "provided, that when the road is completed, and when we occupy the street hereafter, we will reimburse you for the work you are now doing."

There is, in our judgment, no error in the case, and I will make the same remark about this case as I did about the other, that there is a great number of instructions which are substantially the same in the two cases. We think the judgment in this case should also be affirmed.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 24.

THE METROPOLITAN RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA,

Defendant in Error.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

W. D. DAVIDGE,
NATH'L WILSON,
Of Counsel for Plaintiff in Error.

J. L. Pearson, Pr., 9th and D sts.

IN THE

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Defendant in Error.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This was an action brought by the defendant in error, in November, 1880, to recover from the plaintiff in error $153,216.15, on account of work done and materials furnished by the defendant in error, the District of Columbia, in the paving of certain streets and avenues in the city of Washington at various times in the years 1871, '2, '3, '4, and '5, upon and in consequence of the failure of the plaintiff in error (the defendant below) to do said work and furnish said materials in accordance with its duty, as prescribed by statute.

The plaintiff in error was chartered by an act of Congress dated July 1, 1864, and amended March 3, 1865. (R. pp. 35, 36, 65, and 71.)

By these acts it was authorized to construct and operate lines or routes of double track railways in designated streets and avenues in Washington and Georgetown, in this District.

The seventeenth section of the first-mentioned act required the completion of the railways on one of the routes, that is, the route between the Capitol and 17th street west, within four months after the organization of the company, and on the other routes within one year after such organization. These times for completion were extended by an amendatory act of January 30, 1865, as follows: The first period to thirty days after the passage; the second to one year after such passage. (R. 71.) The latter period was further extended by amendatory acts of March 2, 1867, and March 3, 1869, to January 1, 1869, and then to five years from March 3, 1869, or to March 3, 1874. (R. 73.)

By the act of March 3, 1865, above mentioned, the plaintiff in error was given "the privilege of extending *at any time* the road now in operation from 17th street west to the Capitol; from the present terminus of said road on A street north, along A street north to 1st street east, along 1st street east to East Capitol street, along East Capitol street to 9th street east, along 9th street east to L street south." (R. 72.)

The significance of the periods within which the plaintiff in error was at liberty so construct and operate its lines of railways, and thereby use and occupy the designated streets and avenues, will appear hereafter.

As to the statutory duties involved in this case, the only provisions of law relied on as creating or defining such duties are the following:

The charter of July 1, 1864, section 1, after giving authority to construct and lay down the railways, and the right to run public carriages thereon drawn by horse-power, concludes as follows: "*Provided*, That the use and maintenance of said road shall be subject to the muni-

cipal regulations of the city of Washington within its corporate limits." (R. 66.)

A similar provision will be found at the end of the first section of the amendatory act of March 3, 1865. (R. 72.)

These provisions were manifestly designed to subject the plaintiff in error to proper police regulations in respect of the conduct and management of its railways.

These provisions are also confined in terms to the municipal regulations of the city of Washington.

The next provision is to be found in section 4 of the act of July 1, 1864. It is in these words:

"That the said corporation hereby created shall be bound to keep said tracks, and for the space of two (2) feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington." (R. 66.)

The next provision is section 5 of the same act, as follows:

"SEC. 5. *And be it further enacted*, That nothing in this act shall prevent the Government at any time, at their option, from altering the grade or otherwise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such grade and pavement." (R. 66.)

It is plain that the last section has no relation whatever to the duty of paving. That duty was imposed and defined by the preceding section *four*, the construction of which it will be for this court to determine.

The whole scope of section 5 is to provide, that in the event of any alteration or improvement of the streets or avenues, and the sewerage thereof, by the Government or the city of Washington, it shall be the duty of the com-

pany to change its said railroad so as to conform to such grade and pavement.

The only duty here prescribed is the *change of the railroad.*

By section 6 of the same act it is provided, "That this act may at any time be altered, amended, or repealed by the Congress of the United States." (R. 66.)

The *original* declaration in this action was filed Nov. 27, 1880. It alleged that by acts of Congress of February 21, 1871, June 20, 1874, and June 11, 1878, it was made the duty of the defendant in error, the District of Columbia, to take charge of and improve, as might be prescribed by law, all the avenues, streets, and alleys of Washington and Georgetown.

It alleged the incorporation of the plaintiff in error by the act of Congress of July 1, 1864, the construction and maintenance of its railroad tracks along the streets and avenues therein named.

It further alleged that, in the exercise of its powers and pursuant to law, the defendant below ordered that the streets and avenues named in the declaration should be repaired and improved by amending the grades and laying down new and greatly needed pavements, and that thereupon it became the duty of the plaintiff in error, *pursuant to the fourth section of its charter hereinbefore set forth*, to conform its track to said grade and to pave the entire space between two lines running parallel with its tracks, two feet from and outside its exterior rails, upon and along said streets and avenues, in conformity with the plan prescribed by the defendant in error; that the plaintiff in error neglected to perform and did not perform said duty; that the defendant below was therefore obliged to and did grade and pave said portion of said streets and avenues which should have been graded and paved by the plaintiff in error; and that there was due the defendant in error the sum of $153,216.15, "which said account for work and material has been duly pre-

sented to the defendant and payment refused, whereby an action has accrued to the plaintiff to maintain its action against the defendant to recover said sum," &c. (R. 2 to 6.)

The declaration refers to no statutory provision other than the 4th and 5th sections of the charter of the plaintiff in error, hereinbefore set out, as imposing any duty or obligation on the plaintiff.

The cause of action therein stated rests solely upon the neglect of the plaintiff to perform the duty alleged to have been created by the said 4th section of its charter.

The defendant below filed three pleas to the original declaration: 1st. *Nil debet;* 2d. *Non assumpsit infra tres annos;* 3d. *Actio non accrevit infra tres annos.*

Issue was joined on the first plea. The plaintiff below demurred to the second and third pleas. (R. 7.)

The court, at the request of the parties, ordered the demurrer on which issue was joined to be heard in the General Term in the first instance. (R. 8.)

The court in General Term considered the pleas of the statute of limitations bad in substance, and sustained the demurrer, and held that the claim in the declaration "as presented is not obnoxious to the plea of the statute of limitations." (R. 19.)

Considering itself, by the demurrer, "forced to examine the entire case," and the question of the right of the plaintiff to maintain its action, the court went further and held that the defendant was bound by its charter "not only to pave once the designated portions of the streets, but to repair the paving and to change the grade, and lay new pavements within the prescribed limits, whenever the municipality in its discretion should see proper to make changes in the streets, rendering such work proper to be done on the part of the companies." (R. 19.)

The court held, also, that the suit "is based upon an obligation on the part of" the plaintiff in error, the railroad company, implied by construction of law, to repay

to the District what it has expended for work the railroad "was bound by statute to perform without expense to the city." "If this paving," the court said, "has caused any expense to the District, the statutory obligation has been broken, and this fact furnishes the consideration and foundation of the claim for reimbursement." (R. 15.) . . . "We think that a recovery in the present case should be sought in an action of assumpsit founded upon the statutory obligations of the charter. . . . The declaration in its present form must be held to be in debt, and should be changed to assumpsit. It should also charge that the sums paid, and now sought to be recovered back, were what the work was reasonably worth, and it should set forth the other sections of the charter, which require the companies to conform their track to the grade of the street, and should refer to the provision that the road shall be subject to the municipal regulations." (R. 23.)

The plaintiff below, on the 10th of February, 1882, filed an amended declaration, (R. 23–28,) which differs from the original declaration in that it refers to the first and fifth sections of the charter of the plaintiff in error, and charges for additional grading and paving alleged to have been done by the defendant in error, increasing the amounted claimed to $161,622.52. This amended declaration concludes as follows:

"Which said several sums were and are the just and reasonable costs of the said several items of paving, as hereinbefore set forth, amounting in total to the sum of $161,622.52, which said sum, in the form of an itemized account, was afterwards, to wit, on the 25th of February, 1880, presented to the defendant and payment demanded, which was refused, to wit, at the District aforesaid.

"Whereby, and by force and effect of the statutes aforesaid, a right of action hath accrued therein to the plaintiff to maintain its said suit." (R. 28.)

To this amended declaration the plaintiff in error pleaded *non assumpsit*, and various special pleas, among the latter pleas of the statute of limitations. (R. 29 to 32.)

The defendant in error joined issue upon all the pleas except those of the statute of limitations, being the eleventh and twelfth pleas, to which last-mentioned pleas it demurred. (R. 33.)

The cause came on to be heard at a special term on the demurrer of the defendant in error to the plaintiff in error's pleas of limitation to the amended declaration.

The demurrer was sustained, and an exception was taken to the ruling of the court. The cause was thereupon tried by a jury upon the issues of fact joined. (R. 33.)

At the close of the evidence on behalf of the defendant in error the plaintiff in error moved the court for leave to reinstate the pleas of limitation, which, upon the demurrer, had been overruled; but the court refused the motion, and the plaintiff in error duly excepted. (R. 54.)

At the trial of the case the plaintiff gave in evidence the charter of the company, and read to the jury the proviso at the end of section 1, and also sections 4, 5 and 6, above mentioned, and also gave in evidence the four acts of Congress above mentioned, amendatory of said charter.

It was admitted that the said charter was accepted, and the defendant organized thereunder, and that said amendments were also accepted, and that the defendant was in lawful use with its tracks and cars of the streets and avenues described in the declaration.

The plaintiff then gave in evidence an act of the Legislative Assembly of the District of Columbia, approved July 10, 1871, entitled "An act making appropriations for improvements and repairs in the District of Columbia, and providing for the payment thereof," and also the place of improvement referred to in said act, together with the letter of the Board of Public Works and W. D. Cassin to said Legislative Assembly. (R. 36 and 54.)

The plaintiff then read in evidence, from the minutes of the Board of Public Works, certain entries tending to prove that the board, at divers times, awarded to divers

persons contracts to grade and to lay new pavements in certain avenues and streets in the declaration mentioned; and that in pursuance of such awards, contracts were entered into, and the pavements laid, which are mentioned in the declaration. (R. 37, 38, &c.)

All the above awards, and the contracts made in pursuance thereof, called for and required the laying of new pavements in the said streets and avenues, without any reference to the railroad of the defendant, or any duty on its part. (R. 37.)

The contracts were in form like that printed on page 96 and 97 of Record.

The said awards and contracts were all given in evidence against the several objections of the defendant, and exceptions were severally taken to the several rulings of the court admitting them in evidence. (R. 37–40.)

The plaintiff then gave evidence tending to prove that in or about the year 1864, the defendant, in pursuance of its charter, constructed and laid its railroad in and along the following avenues and streets in Washington: Commencing at the junction of A street north, and New Jersey avenue at the north side of the Capitol; then along the east side of New Jersey avenue to D street north, and along D street north, and C street north, and Indiana avenue to the intersection of D street north with Indiana avenue; along Indiana avenue, D street north, and Louisiana avenue to 5th street west; along 5th street west to F street north; along F street north to 14th street west; along 14th street west to H street north; along H street north to 17th street west; and along 17th street west to New York avenue; and thereafter used and operated said railroad, and that the defendant, when it constructed said road, at its own expense, paved with blue and cobble stones the space within the exterior rails of its railroad, and two feet outside; and thereafter, at its own expense, kept and maintained said spaces well paved and in good order until the pavements laid in said spaces were removed

by the plaintiff so as to lay the new pavements hereinbefore mentioned. (R. 37.)

The plaintiff then gave evidence tending to prove that the said pavements were of the materials and furnished at the times alleged in the declaration, and that all of them, as laid, extended from curb to curb, embracing the spaces within the exterior rails of the defendant's railroad, and two feet beyond on each side; and that when in the performance of the work under said contracts, a change of grade of the railroad of the defendant became necessary by reason of an alteration of the grade of the street by the plaintiff, the said change was made from time to time by the defendant, at its own expense; and that the only work done by the plaintiff, the cost whereof is sought to be recovered in this action, is the work done in the spaces between the exterior rails of defendant's railroad, and two feet outside the exterior rails. (R. 37–38.)

The plaintiff then offered evidence tending to prove that when the said act of the Legislative Assembly, approved July 10, 1871, was passed, the defendant had not constructed and laid its railroad in, nor entered upon or used in any manner, any avenue or street except those hereinbefore mentioned, in which the main stem, or old line of the defendant's road, from Seventeenth street to the Capitol, was laid; and that when the contracts were awarded and entered into as aforesaid, for laying new pavements in East Capitol street, Ninth street west, Connecticut avenue, and other avenues and streets in the city of Washington, and other streets in Georgetown, the defendant had not constructed and laid its railroad in the said avenues and streets nor in any way entered on or used the same; but that in the progress of the work of laying pavements under the said contracts in the said avenues and streets, the defendant intending to extend its railroad into and along the said avenues and streets, and with the permission of the said Board of Public Works, granted at the request of the defendant, and in order to

prevent the tearing up the said avenues and streets in the future, laid in the said avenues and streets, the cross-ties and stringers for its railroad; and subsequently and at different times after the said new pavements in the said avenues and streets were completed, laid the rails of the said railway, and thereafter used and operated the said railroad in the said streets and avenues. (R. 38.)

Evidence was further given by the plaintiff tending to prove that the cost of all of said pavements was originally assessed one-third against the lots abutting upon the said avenues and streets, being one-sixth on each side, and the other two-thirds to the plaintiff, except in two instances; and that, except in said two instances, there was no assessment or other charge made against the defendant; that in said instances the defendant was assessed on account of its railroad, as an owner of property abutting on the improvements; that after the acts of Congress of June 19, 1878, and June 27, 1879, were passed, there was a revision of the assessments, and the cost of the pavement in the spaces between the defendant's exterior rails, and two feet beyond the exterior rails, was taken off the abutting lots, and, after examination, assessed against the defendant, and drawback certificates were issued to the owners of said lots as required by said acts; that in respect of said two instances certificates of indebtedness were issued as liens against the railroad, and were, in the year 1873, sold by the plaintiff to the First National Bank, and that the same since the sale have been and now are held by said bank. (R. 54.)

There was evidence tending to prove that notice of said assessments and of the sale thereof was given to the defendant, and that the said revision included as well the pavement for which certificates of assessment had been issued and sold in the two instances aforesaid as the other payments, and that, after the revision, demand of payment was made as alleged. (R. 38, 39–54.)

The plaintiff further gave evidence tending to prove

that the contract prices for laying the pavements in the declaration mentioned were just and reasonable, and were paid by the plaintiff in money and securities as said pavements were completed and measured. (R. 39.)

The plaintiff then rested. (R. 54.)

There was no evidence that when the plaintiff ordered and directed the laying of new pavements in the streets and avenues along which the defendant had constructed its main stem or old line, or afterwards the space between its exterior rail and two feet beyond on each side, was not, in all respects, well paved and in good order as required by the fourth section of the defendant's charter; neither was there any evidence that the plaintiff made demand of the defendant to do the work, for which recovery is sought, or offered any opportunity to the defendant to do such work, or was willing that the same should be done by the defendant.

When the plaintiff rested the defendant moved the court for leave to reinstate the pleas of limitation, but the court refused the motion and the defendant excepted. (R. 54.)

The defendant then moved the court to instruct the jury that the plaintiff was not entitled to recover, but the motion was overruled and the defendant excepted. (R. 54.)

Whereupon the defendant offered evidence tending to prove that at and before the passage of the act of July 21, 1871, the defendant had, so far as it had constructed and laid its said road, paved at its own expense, within the exterior rails and for two feet outside, and had since kept said spaces well paved and in good order at its own expense; and that the same were well paved and in good order when the said contracts were entered into, so far as said railroad was then constructed and laid; to which offered evidence the plaintiff objected, and its objection was sustained, and the defendant excepted. (R. 54.)

And thereupon the defendant further offered to prove by John W. Thompson, the president of the defendant company, that in respect of the avenues and streets in which the cross-ties and sleepers of its railroad were laid in the progress of the work as hereinbefore stated, the defendant, claiming to have under the said act of March 3, 1869, five years from the date of the said act within which to construct and lay its railroad, and under the said act of March 3, 1865, an indefinite time for the extension of its railroad along A street north to First street east, along First street east to East Capitol street, along East Capitol street to Ninth street east, and along Ninth street to L street south, had in good faith determined to avail itself of the delay allowed by law, and not to construct and lay its railroad in the said avenues and streets until after the new pavements were laid by the Board of Public Works, and made known such determination to the said Board of Public Works; and that the said board thereupon agreed with the defendant that if the latter would, in the progress of laying the pavements in the said avenues and streets, lay its cross-ties and sleepers and thereby prevent the necessity of tearing up the pavements in the future, when and as the defendant might elect to construct and lay its railroad in the said avenues and streets, that the laying of such cross-ties and sleepers at the instance of the said board, and entering upon and using for that purpose the said avenues, should not involve any liability on the part of the defendant to pay for any part of the said pavements, but that the said defendants should stand in respect of liability as if the said cross-ties and sleepers had not been laid by it, nor the said avenues and streets entered upon and used for such purposes; and that thereupon the defendant assented to the said agreement, and, confiding in the same, laid at its own expense the said cross-ties and sleepers; and that the letter of the 26th of October, 1871, was written at the instance of the said board, and that the said letter and resolution of the same

date were in pursuance of the said agreement intended to carry into effect the same; and the defendant claimed that the said offered evidence was admissible as independent evidence, and also as explanatory of the said letter and resolution.

To which offered evidence the plaintiff objected; and the court sustained the objection, and ruled that the said offered evidence was not admissible for any purpose, and refused to allow the said evidence, or any part thereof, to be given to the jury. (R. 55.)

And thereupon the defendant gave evidence by the said witnesses examined by the plaintiff, who had been members of the Board of Public Works, tending to prove that the Board of Public Works, in the construction of the authority delegated to it by law, claimed that the power and duty was exclusively devolved on it of paving the avenues and streets from curb to curb, including the spaces mentioned in the fourth section of the said charter; and on cross-examination of A. B. Mullett, a witness called in behalf of defendant, he testified that he was a practical engineer, and a member of the Board of Public Works at the time of the doing of the work sued for in this action, and that it was, in his opinion, impracticable to divide the work of paving the spaces included between the concrete lines of the streets and avenues mentioned in the declaration, and the outer rails of defendant's tracks in said streets and avenues, so as to enable the plaintiff to do the said work up to the imaginary line two feet from the outer rails of the defendant's said tracks, and enable the defendant to do the work of paving the spaces between said imaginary lines and its said outer rails; and in awarding and entering into the said contracts, and in the execution of the work thereunder, acted in pursuance of such claim, and did not make any request or demand upon the defendant to do the work, whereof the costs are claimed in the declaration, nor offered it any opportunity to do the same; that at the

commencement of the work on the line of the defendant's railroad, then constructed and laid, the right was claimed by the defendant, when the pavement in the spaces aforesaid laid by the defendant had been taken up on account of a change in grade, to relay the said pavement, which right was denied and refused by the said board; and that the said board, in awarding contracts for all pavements to be laid on the line of the defendant's railroad, declared and defined its policy and determination that it would, itself, lay the said pavements over the entire roadway from curb to curb, and with such material as the said board had selected, and that neither in the laying of the said pavement, nor in the selection of the material to be used, did the defendant take part.

The defendant further gave evidence tending to prove that it never received any request or demand on behalf of the plaintiff or the said board, nor had any opportunity afforded to do any part of the work mentioned in the declaration, nor did the said defendant offer to do any of said work sued for, and whereof the costs are sought to be recovered in this action; that the prices paid by the plaintiff for the said work were excessive and exorbitant, being in some instances more than fifty per cent. in excess of the fair and reasonable prices and of the cost of the material and labor, after allowing for all expenses and a reasonable profit to the contractor; that the said contracts were awarded arbitrarily and without competition; that the said scale of rates was established by said board September 14, 1871, and was excessive and exorbitant, and deviated from by the said board from time to time; that the same was established after advertisement in a single newspaper in the city of Washington, calling for rates at which bidders would lay the different pavements, but not giving, or purposing to give, the work in pursuance of such bids, and that the said scale of rates was extravagantly high.

The defendant further gave evidence that the pave-

ments laid by the plaintiff in the avenues and streets alleged in the declaration were utterly unsuitable, and that such as were of wood soon rotted away, and in a short time it became necessary to replace all, or nearly all, with others; and that the cobble-stones with which the defendant had paved along its railroad as above mentioned, were removed and appropriated and used by the plaintiff, and of the value of which cobble-stones evidence was given.

And thereupon the defendant rested its case.

The evidence contained in the bill of exceptions was all the evidence in the cause.

In response to prayers submitted by both sides (R. 57, 59), the court gave a series of instructions, at the instance of the defendant in error (R. 64), but refused all the prayers of the plaintiff in error. (*Id.*)

Taking the instructions given by the court in connection with the rejected prayers of the plaintiff in error, it will be found that the court ruled the following propositions of law:

First. That the duty of the plaintiff in error was not as defined by the fourth section of its charter to keep well paved and in good order the spaces mentioned in said section, but that notwithstanding the said spaces were in fact so kept, the further duty rested upon it to pave the said spaces from time to time with the material directed by the defendant in error; that is, that the measure of the duty of the plaintiff in error was not to keep the said spaces *in fact* well paved and in good order, but according to the direction of the defendant in error.

Second. That if the duty of the plaintiff in error depended upon the will and discretion of the defendant in error, the plaintiff in error was not entitled to the exercise of such will and discretion, and an opportunity to comply therewith.

Third. That the duty of the plaintiff in error, although defined by the charter to be "to keep the said *tracks*, and for the space of *two feet beyond the outer rail thereof*, and also *the space between the tracks, at all times well paved*," &c., commenced and was operative before there were any tracks or outer rails or spaces between tracks, and notwithstanding the plaintiff in error was not in default in respect of laying down its railways, but was expressly authorized by law to delay their completion on the line between A street north and L street south for an indefinite time, (R. 72,) and on the other lines, except that between 17th street west and the Capitol, until March 3, 1874, or after the work was done for the cost whereof this action is brought.

Fourth. That although the duty to pave the said spaces was imposed by law upon the plaintiff in error, yet that the defendant in error had the right to perform the said duty without any demand on the plaintiff in error to perform, followed by its refusal or neglect, or affording any opportunity to perform, and that upon such performance by the defendant in error the law would imply a promise on the part of the plaintiff in error to pay the cost thereof.

Fifth. That the postulate of the implied assumpsit was not the refusal or neglect of the plaintiff in error to perform its statutory duty, after demand, or, in other words, its default, but that the defendant in error had primarily the right to perform said duty at the cost and expense of the plaintiff in error, and that if the plaintiff in error would prevent the exercise of such right, it was its duty to offer itself ready to do the work as soon as it had notice or knowledge that the defendant in error was proceeding to do the same.

Sixth. That in the absence of such offers by the plaintiff in error, the law implied a promise to pay without demand and refusal or neglect, notwithstanding the defendant in error, in the interpretation of its powers, claimed

that the right and duty to pave the said spaces in common with the rest of the streets and avenues belonged to it and not to the plaintiff in error, and in pursuance of said claim made contracts for paving the entire streets from curb to curb, and paid the cost of said paving as an entirety, and assessed and collected part of the said cost from the property holders, and without any reference to the duty of the plaintiff in error to pave at its own expense the said spaces, and never in any manner claimed or asserted that the cost of paving the said spaces devolved on the plaintiff in error until after the passage of the acts of June 19, 1878, and June 27, 1879.

Seventh. That the said offer by the plaintiff in error was not excused by the pretension or claim of the defendant in error that the paving of the spaces in the said streets and avenues belonged to it in common with the rest of the said streets and avenues, and that the said offer would have been ineffectual and useless.

Eighth. That after the defendant in error had paved the said spaces in common with the rest of the streets and avenues, and paid two-thirds of the cost and assessed the other one-third to property-holders, and after the said assessments had been ratified and confirmed by the said acts of June 19, 1878, and June 27, 1879, it was competent for the defendant in error to maintain this action.

Ninth. That the ordinary rule of damages was not applicable, but that the plaintiff in error was bound to pay, not the reasonable cost of the paving, but the reasonable expense to which the defendant in error was put "under all the circumstances."

Other rulings, less important, but not less erroneous than the above, were made by the court.

Under the instructions, the jury found a verdict for the plaintiff in the sum of $147,507.05, without interest (R. 34), on which verdict judgment was rendered (R. 34),

which judgment was affirmed in General Term (R. 102), and this writ of error sued out.

ASSIGNMENT OF ERRORS.

I. The court erred in holding that the duty of the plaintiff in error was not discharged by keeping the said spaces in fact well paved and in good order, but that notwithstanding the said spaces were so kept, the further duty rested upon it of laying new pavements when and of such material as might be directed by the defendant in error.

Prayers of plaintiff in error refused (R. 59, 64):

"First. The duty imposed upon the defendant by its charter, so far as involved in this suit, was to keep the space embraced within two lines drawn two feet from the outer rails of its tracks, and running parallel with said tracks, at all times well paved and in good order, without expense to the United States or the cities of Washington and Georgetown. The measure of the said duty in relation to keeping the said space at all times well paved and in good order, and the manner of performing the same, depended upon the law of the land, and not upon the discretion or judgment of the plaintiff. And the said duty was owing and to be performed by the defendant; and if from the whole evidence the jury shall find that the defendant did keep the space above mentioned at all times well paved and in good order, and that notwithstanding the fact that said space was so kept well paved and in good order, the plaintiff did the work for the cost whereof this action is brought, then the plaintiff is not entitled to recover.

"Second. If the jury shall find from the whole evidence that before and at the time the work was done, the cost whereof is sought to be recovered in this action, the space to which the duty of the defendant related was well paved and in good order, and that the said work was notwithstanding done by the plaintiff, then the plaintiff is not entitled to recover in this action."

Instructions given (R. 57, 58, 64):

"First. The jury is instructed that if they find from the evidence that the municipal authorities ordered and

directed that the streets and avenues named in the declaration, and along and over which the tracks of the defendant's railroad are laid, should be repaired and improved by laying down new pavements of wood and concrete, as set forth in the declaration, and that said authorities thereupon entered upon the performance of the said work, and shall further find that the defendant company had notice or knowledge that the said authorities had so ordered and directed, and had entered upon the performance of said work, it thereupon became the duty of the defendant company, without delay, to conform its tracks to the grade of the new work, and to pave its tracks and the space between the same, and also to pave the space of two feet on each side of its outer rails, to conform to the plan and character of the pavement then being laid in said streets and avenues, respectively, by the said municipal authorities; and if the jury shall further find that the defendant company neglected to pave its tracks, and the space between the same and for two feet on each side of the outer rails thereof, and that the said authorities thereupon paved the said spaces, as described in the declaration, and paid the cost of paving the same, then the plaintiff is entitled to recover in this action against the defendant such sum as the jury shall believe was the reasonable cost of performing the said work at the time or times it was done.

"Third. The municipal authorities were under no obligation to notify the defendant company that it was expected to pave its tracks, the spaces between the same, and for two feet outside of the outer rails thereof, or to demand that the defendant should perform the said work. As soon as the defendant had notice or knowledge that the municipal authorities had ordered and directed new pavements to be laid in the streets and avenues mentioned in the declaration, and that they were commencing the work, it forthwith became the duty of the defendant to offer itself ready to do the paving, and to proceed to do the same, in such manner as to conform to the altered grade and the character of the said new pavements then being laid by the said authorities; and in the absence of such offer, and upon the neglect of the defendant who commenced the work, it became the duty of the said authorities to perform the same at the reasonable cost of the defendant.

"Fourth. Notwithstanding the jury may find that the pavements selected by the municipal authorities, and charged for in this action, were unwisely selected and soon perished, or became unserviceable, the plaintiff will still be entitled to recover what the said work was reasonably worth at the time it was performed."

II. The court erred in holding that, the duty of the plaintiff in error depending, as ruled, not upon the condition of the said spaces, but upon the judgment and discretion of the defendant in error, there was any exercise of such judgment and discretion so as to make it the duty of the plaintiff in error to do the work in question.

Prayers of plaintiff in error refused (R. 60, 63, 64):

"Sixth. The passage of the act of the Legislative Assembly, given in evidence, and the adoption of the comprehensive plan therein referred to, did not make it the duty of the defendant to do the work for which a recovery is sought in this action.

"Seventh. The orders or awards of the Board of Public Works, awarding contracts for doing the work, for part of which a recovery is sought, did not make it the duty of the defendant to do such work.

"Eighth. The passage of the act of the Legislative Assembly of the 10th of July, 1871, and the orders or awards mentioned in the seventh prayer, even if known to the defendant, and followed by knowledge that contracts had been made by the Board of Public Works for the pavements, the cost for a portion whereof is sought to be recovered in this action, and by knowledge that said contracts were in course of execution by the performance of the work therein provided for, did not make it the duty of the defendant to do the work described in the declaration.

"Twenty-sixth. There is no evidence in this cause that the plaintiff gave any order or direction requiring the defendant to discharge its duty in respect of the space to which such duty related, or in respect of putting the defendant in default as to any such duty, and in the absence of such evidence the plaintiff cannot recover in this action."

First and third instructions given, set out in first assignment.

III. The court erred in holding that the duty of the plaintiff in error to pave the said spaces commenced and was operative before the railway was completed by laying the tracks and rails.

Prayers of plaintiff in error refused (R. 62, 64):

"Eighteenth. The duty imposed upon the defendant by its charter is to keep its tracks, and for the space of two feet beyond the outer rails thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the cities of Washington and Georgetown. The defendant is not liable in this action, except when at the time the plaintiff directed a street or avenue to be paved the defendant had laid down and constructed its tracks upon such street or avenue; and the burden of proof is upon the plaintiff to show that at the time of such direction the defendant had laid down and constructed its tracks.

"Nineteenth. The laying by the defendant, contemporaneously with the laying of the pavements, of cross-ties and sleepers, under the privilege accorded by the resolution of the Board of Public Works of the 26th of October, 1871, given in evidence, and to prevent the tearing up of the pavements in the future, would not, in the absence of any other use or occupation of any street or avenue by the defendant before the completion of the pavements, render it liable for the discharge of the charter duty to keep well paved and in good order the space to which such duty related, as claimed in this action."

First and third instructions given as in first assignment.

IV. The court erred in ruling that evidence was inadmissible to show that the plaintiff in error, so far as it had constructed its railroad, had at and before the passage of the act of February 21, 1871, and afterwards, kept the said spaces well paved and in good order at its own expense, and that the same was well paved and in good order when the contracts for laying new pavements were entered into, and the new pavements laid.

Offer and rejection (R. 54):

"And thereupon the defendant, to maintain the issues on its part joined, offered to prove that at and before the

passage of the said act of February 21, 1871, the defendant had, so far as it had constructed and laid its railroads, paved at its own expense within the exterior rails and for two feet outside, being the spaces mentioned in section four of its said charter, and had since kept the said spaces well paved and in good order, at its own expense, and that the same were well paved and in good order when the contracts for pavements along the line of the said railroad, so far as then constructed and made, were awarded and entered into and new pavements made thereunder; to which offered evidence the plaintiff objected, and the court sustained the objection, and to the said ruling the defendant excepted."

V. The court erred in holding that evidence was inadmissible to show that, as to streets and avenues in which cross-ties were laid by the plaintiff in error in the progress of the work of paving, the plaintiff in error made known its intention to avail itself of the delay allowed by law for the construction of its railroad in the said streets and avenues to the Board of Public Works, and that thereupon the Board agreed that if the plaintiff in error would in the progress of the work lay its cross-ties and sleepers, and thereby prevent the necessity of tearing up the pavements in the future, the laying of said cross-ties and sleepers at the instance of the Board, and the use for that purpose of the streets and avenues, should not involve any liability of the plaintiff in error, but that it should stand in respect of liability as if the cross-ties and sleepers had not been laid.

Offer of evidence and its rejection (R. 54, 55):

"And thereupon the defendant further offered to prove by John W. Thompson, the president of the defendant company, that in respect of the avenues and streets in which the cross-ties and sleepers of its railroad were laid in the progress of the work as hereinbefore stated, the defendant, claiming to have under the said act of March 3, 1869, five years from the date of the said act within which to construct and lay its railroad, and under the said act of March 3, 1865, an indefinite time for the extension of its railroad along A street north to First street east, along

First street east to East Capitol street, along East Capitol street to Ninth street east, and along Ninth street to L street south, had in good faith determined to avail itself of the delay allowed by law and not to construct and lay its railroad in the said avenues and streets until after the new pavements were laid by the Board of Public Works, and made known such determination to the said Board of Public Works; and that the said Board thereupon agreed with the defendant that if the latter would, in the progress of laying the pavements in the said avenues and streets, lay its cross-ties and sleepers, and thereby prevent the necessity of tearing up the pavements in the future, when and as the defendant might elect to construct and lay its railroad in the said avenues and streets, that the laying such cross-ties and sleepers at the instance of the said Board, and entering upon and using for that purpose the said avenues, should not involve any liability on the part of the defendant to pay for any part of the said pavements, but that the said defendant should stand in respect of liability as if the said cross-ties and sleepers had not been laid by it, nor the said avenues and streets entered upon and used for such purposes; and that thereupon the defendant assented to the said agreement, and confiding in the same, laid at its own expense the said cross-ties and sleepers; and that the letter of the 26th of October, 1871, was written at the instance of the said Board, and that the said letter and resolution of the same date were in pursuance of the said agreement intended to carry into effect the same; and the defendant claimed that the said offered evidence was admissible as independent evidence, and also as explanatory of the said letter and resolution.

"To which offered evidence the plaintiff objected; and the court sustained the objection, and ruled that the said offered evidence was not admissible for any purpose, and refused to allow the said evidence, or any part thereof, to be given to the jury; and to the said ruling the defendant excepted."

VI. The court erred in ruling that, although the duty to keep paved and in good order the said spaces was imposed by law upon the plaintiff in error, it was competent for the defendant in error to discharge the duty of

the plaintiff in error, and charge to it and recover the cost of performance without any demand followed by refusal or neglect, and without offering it any opportunity to perform its duty.

Prayers of plaintiff in error refused (R. 60, 61):

"Ninth. Even if the duty of the defendant, in respect of keeping well paved and in good order the space between the outer rails of its tracks, and for two feet beyond, was not to be governed in its exercise by the law of the land, but by the discretion of the plaintiff, so that the defendant was bound not only to keep the said space well paved and in good order, but so to keep the same as prescribed by the plaintiff, still the right to do the work in the manner prescribed by the plaintiff belonged to the defendant; and it was not competent for the plaintiff to do the said work except upon demand to the defendant, and its refusal or neglect to do the same; and if the work, or any part thereof, whereof the cost is sought to be recovered in this action, was not done after such demand of the defendant, and its refusal and neglect, then for the cost of such work, or part thereof, the plaintiff is not entitled to recover.

"Tenth. The plaintiff could not in law become the creditor of the defendant in respect of any work, the doing whereof by law devolved upon the defendant, without demand to the defendant to do the same, followed by refusal or neglect; and the jury are instructed that, unless they find from the evidence that such demand was made and followed by refusal or neglect, the plaintiff is not entitled to recover.

"Eleventh. The plaintiff could not in law become the creditor of the defendant in respect of any work, the doing whereof was by law devolved upon the defendant, without a demand upon the defendant to do such work; and the jury are instructed that, unless they find from the evidence that such demand was made, the plaintiff is not entitled to recover.

"Fifteenth. The plaintiff was not legally entitled to do the work, the cost whereof is sought to be recovered in this action, primarily, but only in the event of default on the part of the defendant; and as there is no evidence to show that such default was communicated to the plaintiff, and that thereupon the plaintiff ordered or directed the

said work to be done in consequence of such default, this action cannot be maintained, and the jury must find for the defendant."

First and third instructions given, set out in first assignment.

VII. The court erred in ruling that the plaintiff in error, if it would avoid becoming the debtor of the defendant in error, was bound, notwithstanding there was no demand followed by refusal or neglect, *to offer itself* ready to do the work.

First and third instrustions given as set out in first assignment.

VIII. The court erred in ruling that such offer was necessary, notwithstanding the defendant in error, in the interpretation of its powers, claimed that the right and duty to pave the said spaces were by law devolved upon it, and that in paving the same it was acting in its own behalf and not in consequence of the default of the plaintiff in error, and that such offer would have been unavailing and useless.

Prayer of plaintiff in error refused (R. 63, 64):

"Twenty-eighth. If the jury shall find that the Board of Public Works, in the execution of the comprehensive plan as given in evidence, assumed to act in exclusion of any right or duty on the part of the defendant to pave the space to which its duty related, and made contracts to pave from curb to curb and including the said space, and declared its fixed determination to do the work itself, wholly irrespective of any right or duty on the part of the defendant; and that such determination was communicated to the defendant, and that any offer on the part of the defendant to do said work would have been unavailing, and the defendant knew such fact, then it was not incumbent on the defendant to make such offer; and if under the above circumstances the plaintiff persisted in doing said work, and paid therefor, it cannot maintain this action to recover the reasonable cost of said work from the defendant, notwithstanding, as charged by the

court, in the absence of facts, rendering such offer useless, it was the duty of the defendant to offer to do said work in the manner prescribed by the plaintiff."

IX. The court erred in refusing to rule that if the defendant in error, in the interpretation of its own powers and the duty of the plaintiff in error, claimed the right to lay the pavements from curb to curb, including the said spaces, and acting upon such interpretation and claim, did the work in the said spaces, without demand upon the plaintiff in error, and its refusal or neglect, then the said interpretation was erroneous; and for the money paid out in mistake of law, and without affording an opportunity to the plaintiff in error to discharge its duty, this action cannot be maintained.

Prayers of plaintiff in error refused (R. 61, 63, 64):

"Twelfth. If, from the evidence, the jury shall find that the plaintiff or the Board of Public Works, in the interpretation of the powers granted to them by law, claimed the right to pave the streets and avenues from curb to curb, and denied that to the defendant belonged the duty and correlative right to pave the space between the outer rails of its tracts and for two feet beyond, and that under and in pursuance of said interpretation the work, for the cost whereof this action is brought, or any part of such work, was done without demand to the defendant, or any refusal or failure on its part in pursuance of such demand, then the said interpretation was erroneous, and no right of action accrued to recover from the defendant money expended for work done as aforesaid, notwithstanding the failure to make such demand.

"Twenty-fifth. There is no evidence in this cause that the plaintiff claimed that the defendant, by its duty as prescribed, was bound to pave the space in question. If the plaintiff, in its interpretation of its powers and the duty of the defendant, claimed the right to lay the new pavements upon the space in question and from curb to cub, and, acting upon such claim, ordered the work to be done, and the same was accordingly done and paid for by the plaintiff, without demand to the defendant to pave the said space, and its refusal or neglect, after demand so

to do, then the said interpretation was erroneous; and for the moneys so paid out in mistake of law and without affording an opportunity to the defendant to discharge its duty, the plaintiff cannot maintain this action."

X. The court erred in refusing to rule that, even if the defendant in error directed the spaces to be paved by the plaintiff in error and there was default on its part, there was any evidence to show any action on the part of defendant in error based upon such default and authorizing the paving of the spaces at the expense of the plaintiff in error.

Prayers of plaintiff in error refused (R. 62, 63, 64):

"Seventeenth. If it be assumed that the plaintiff succeeded to the interest of the cities of Washington and Georgetown in the performance of the duty imposed upon the defendant by its charter to keep at all times well paved and in good order the space between the outer rails of its tracks, and for two feet beyond, still the government created by the act of the 21st of February, 1871, was one of plenary authority. It had the right to construe the charter duty of the defendant and the interest of the plaintiff therein, and the legislation of the plaintiff fails to show that it regarded the new pavements authorized to be laid as within such duty; or that, if it did so regard such new pavements, it took any steps to exact the performance of such duty, or to enable the plaintiff or its agents to do the same by putting in default the defendant.

"Twenty-seventh. According to the proper construction of the order or direction of the plaintiff, the same was subject to the duty and correlative right on the part of the defendant to pave the space to which such duty related, and the refusal on the part of the Board of Public Works to recognize such duty and right, if found by the jury, was illegal and void; and for any money of the plaintiff expended by the said board for work done in pursuance of such refusal the plaintiff cannot recover in this action."

XI. The court erred in refusing to rule that after the cost of paving the said spaces had, in common with the cost of paving the residue of the streets and avenues, been

assessed as to two-thirds thereof upon the defendant in error, and as to the other one-third against the abutting property, and said assessments had been ratified and confirmed, the acts of June 19, 1878, and June 27, 1879, ratified and confirmed the said assessments as made, subject only to the relief specially provided for.

Prayer of plaintiff in error refused (R. 61, 64):

"Thirteenth. The acts of June 19th, 1878, and June 27, 1879, authorizing the revision of assessments and the issue of drawback certificates at the instance of the parties mentioned in said acts, ratified and confirmed the assessments as made, subject only to the relief which was provided for by the said acts in behalf of said parties. The said acts did not authorize any revision except at the instance and for the benefit of the said parties, nor the imposition upon the defendant of any amounts remitted and for which drawback certificates issued, nor did the acts give any right of action against the defendant which would not have existed had they simply ratified and confirmed the assessments as made."

XII. The court erred in ruling that the measure of damages was not the reasonable cost of the work, but the reasonable expense to which the defendant in error had been put.

Instruction given (R. 64):

"Eighth. The plaintiff is not restricted in this action to recovery of merely what it might have cost the defendant to do the work described in the declaration at the times therein stated. The plaintiff is entitled to recover the reasonable expense to it, or its legal predecessors, of doing the said work, due regard being had to all the circumstances of the case as disclosed by the testimony."

XIII. The court erred in sustaining the demurrers of the defendant in error to the pleas of limitation of the plaintiff in error.

Judgments on demurrer. (R. 8, 33.)

XIV. The court erred in denying leave, at the close of

the evidence of the defendant in error, to reinstate the pleas of limitation.

Motion and order overruling. (R. 54.)

XV. The Court in General Term erred in affirming the judgment of the Circuit Court. (R. 102.)

Argument and Points.

This action was brought upon an implied promise to repay to the defendant in error certain moneys paid, laid out, and expended by it for the benefit of the plaintiff in error. That such is the whole scope of the action is conceded. In the words of the opinion of the court below, (4 Mackey, 227,) "it is substantially an action to recover money paid, laid out, and expended by the District for the defendant at its special instance and request." The foundation of the implied assumpsit, as alleged in the declaration, is, that the plaintiff in error owed a certain statutory duty which it was bound to perform; that it neglected to perform said duty, and that thereupon the defendant in error was "obliged" (R. 25) to perform said duty, and that in such performance it expended large sums of money which the plaintiff in error is under an implied assumpsit to refund. It is manifest that the conditions of the right to recover in such a case are, first, that the plaintiff in error owed the alleged duty; secondly, that it failed to perform such duty; and, lastly, that the defendant in error performed it under such circumstances as would give rise to an implied promise.

I.—The Duty of the Plaintiff in Error.

This is the subject of the first, second, third, fourth and fifth assignments of error.

The duty is to be found in the charter granted by Congress and accepted by the plaintiff in error. No other source of duty is pretended. The duty created by the

charter, it is admitted, has all the force of an act of sovereign power as well as of a contract.

The original declaration in this cause, prepared by counsel of acknowledged ability, derived the duty from the fourth section of the charter, which provides "that the corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order without expense to the United States or to the city of Washington." (R. 23.)

At the hearing of the demurrer in general term it was suggested by Mr. Justice Hagner, who delivered the opinion of the court, and afterwards tried the case at circuit, that other ~~the~~ provisions of the charter had a bearing upon the duty, and that the declaration should be amended by setting that out. (R. 23.) The declaration was accordingly amended so as to derive the duty not only from the above section 4, but also from a proviso at the end of the first section, and from sections five and six. These provisions are as follows:

Proviso, section 1: "*Provided*, That the *use* and *maintenance* of the said road shall be subject to the municipal regulations of the *city of Washington within its corporate limits.*"

"SEC. 5. That nothing in this act shall prevent the Government at any time, at their option, from altering the grade or otherwise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said company to *change their said railroad so as to conform to such grade and pavement.*

"SEC. 6. That this act may at any time be altered, amended, or repealed by the Congress of the United States."

At the trial the charter was given in evidence and its acceptance was admitted. The defendant in error itself proved that in about 1864, the date of the charter, the

plaintiff constructed and laid down its railroad in certain streets and avenues, being the line between 17th street and the Capitol, *and at the same time, at its own expense, paved the spaces mentioned in the 4th section of the charter with blue and cobble stone, and thereafter, at like expense, kept and maintained the said spaces well paved and in good order until the pavements laid in the said spaces were removed by the defendant in error so as to lay the new pavements.* (R. 36, 37.)

And the defendant in error itself further gave in evidence that whenever in its performance of the work of laying down the new pavements a change of the grade of the railroad became necessary so as to conform to an alteration of the grade of the street or avenue, *such change was made by the plaintiff in error at its own expense, and that the only work done by the defendant in error, the cost whereof is sought to be recovered in this action, is the work done in said spaces.* (R. 37.)

Thus it was admitted by the defendant in error that, if the measure of duty on the part of the plaintiff in error was as prescribed by the fourth section, to keep well paved and in good order the spaces mentioned in said section, such duty had been performed; and further, that the only recovery sought by the defendant in error was for laying new pavements in the said spaces.

The court held that the fact that the plaintiff in error had kept the said spaces at all times well paved and in good order, thus literally complying with the duty prescribed by the fourth section, was no defence to the action, but that the measure of duty was, not as defined by that section, but as the defendant in error might from time to time declare, and hence that, although the said spaces were in fact kept as prescribed by the fourth section, it was the duty of the plaintiff in error from time to time, at its own expense, to lay down new pavements whenever directed by the defendant in error. Thus the measure of duty was made to depend, not on the law of the land and the fact, but on the arbitrary will of the municipality.

The existing pavements in the spaces, however good and suitable, were to be replaced by new pavements, however bad and unsuitable. Such was the ruling.

What, then, was the duty of the plaintiff in error? This is a main point in the case, not only in respect of the admitted performance of the duty if it was as prescribed by the fourth section, but in other respects, and even upon the assumption that the court was right, as will be shown hereafter.

1. It was undoubtedly for Congress in its discretion to prescribe and define the duty of the plaintiff in error as to keeping paved and in good order portions of the streets and avenues over which it was authorized to construct its lines of railway. The question, therefore, as to the measure of duty is purely one of construction, for it is not pretended that the duty as prescribed and defined by the charter could be changed or modified by the defendant in error, or that it ever attempted so to do.

An examination of the charter will show that the fourth section was intended to prescribe and define this duty. That section, only, treats of the subject of "keeping well paved and in good order" any portion of the streets and avenues. What does it provide?

First, it imposes the duty on the plaintiff in error and no other body: it says, "the said corporation hereby created shall be bound." Next, it declares of what the duty shall consist; it shall "keep well paved and in good order without expense to the United States or to the city of Washington;" thus making the measure of duty the fact and the law of the land, and not the arbitrary will or discretion of another. Lastly, it declares to what the duty shall attach, and, by necessary inference, when it shall commence: "*said tracks* and for the space of two feet *beyond the outer rail*, and also the space between the tracks."

All the elements of the duty are thus specifically declared and defined: the person to be bound—the charac-

ter of the duty—the subject or thing upon which it is to be exercised.

A comparison of the fourth and fifth sections of the charter will show that the duty to pave was not made dependent upon the judgment or direction of the defendant in error, whilst the duty to change the railroad so as to conform to altered grades was made so dependent. The reason of this is apparent. It was intended that the paving of the spaces described in section four should be left to the discretion of the plaintiff in error, provided only they should be kept well paved and in good order. In respect of such spaces the business of the company, and, indeed, humanity, required or might require a pavement different from that of the residue of the street or avenue. Experience has shown this to be the case, and has confirmed the wisdom of the enactment. The grades, however, of the streets and avenues stood upon a different footing. To allow bad grades to continue merely because a railroad was constructed upon them was absurd. Hence the fifth section required the change of the railroad so as to conform to new grades whenever they should be established by the Government or municipal authorities. Thus Congress *ex industria* discriminated between the duty to pave and the duty to conform the railroad to new grades. When it is intended that the duty shall be dependent upon the will of another, it is so stated in plain and explicit terms.

2. The duty and its terms being perfectly clear, it matters not what considerations controlled Congress in its legislation. It may not be out of place, however, to observe that these considerations are as free from any shadow of doubt as the enactment which emenated from them. The governments of the District at the time of the charter (1864) consisted of two petty municipal corporations as to Washington and Georgetown, with the usual powers, including the power to pave and keep in order the streets and avenues. The county beyond these was governed

by a quasi-corporation known as the Levy Court. All these corporations continued until February 21, 1871, (16 Stats. 419,) when they were superseded and a new corporation with large powers, the predecessor of the defendant in error, was created.

The charter of the plaintiff in error was the second granted by Congress in relation to the construction and maintenance of street railways. It had previously, May 17, 1862, granted the charter of the Washington and Georgetown Railroad Company. That charter (12 Stats. 388) contained a provision as to keeping paved and in good order, similar to the fourth section of the charter of the plaintiff in error.

In both charters the duty and its performance were made to depend upon the fact and the law of the land without any reference to the will or discretion of any municipal body. Thus the omission of such a reference in the later charter cannot be ascribed to inadvertence, but, on the other hand, must be regarded as intentional, and in pursuance of some policy established by the former. What was that policy? Simply, that as experience had demonstrated that a well constructed street railway required or might require a very different pavement for the portion of a public highway dedicated to railway purposes from what might be suitable for the rest of the highway, it was wise, in the inauguration of a street-railway system, to impose upon the railway company the duty of paving, at its own expense, such portion in such manner and of such material as it might deem best adapted for its purposes, holding it, however, responsible under the law for keeping at all times such portions well paved and in good order, instead of turning over such portion, in common with the rest of the highway, to the discretion, possibly arbitrary or capricious, of a petty municipality.

Such was the policy adopted by Congress and finding expression in the plain terms of the charter duty. Its

wisdom could not be better illustrated than by the present suit, in which the claim is made that the plaintiff in error shall be held bound to pay for pavements of wood and concrete, confessedly unsuitable and worthless for the purposes of railway travel, simply because, as alleged, the defendant in error directed them to be laid.

The policy thus declared has never been abandoned, though modified and restricted somewhat by subsequent legislation. By the act of June 11, 1878, (20 Stat. 102,) entitled "An act providing a permanent form of government for the District of Columbia," it was provided (p. 106) that "when any street or avenue through which a street railway runs shall be paved, such railway company shall bear all of the expense for that portion of the work lying between the exterior rails of the tracks of such roads, and for a distance of two feet from and exterior to such track or tracks on each side thereof, and of keeping the same in repair; *but the said railway companies, having conformed to the grades established by the Commissioners, may use such cobble-stone or Belgian blocks for paving their tracks, or the space between their tracks, as the Commissioners may direct.*"

Here is a modification as to *space* and *material*, but the right of the railway companies to do the work and select the material, cobble-stones or Belgian blocks, is distinctly recognized and preserved. More than that, this law, which is now in force, declares that the part of the roadway used for railway purposes *shall* be of cobble-stones or Belgian blocks, whatever the material of the rest of the pavement; thus asserting and enforcing the difference between railway and ordinary uses of the highway.

On the 17th of July, 1876, Congress passed an act for the repavement of Pennsylvania Avenue. The third section is in these words: "That the cost of laying down said pavement shall be paid for in the following proportions and manner: The Washington and Georgetown Railroad Company shall bear all of the expense for that

portion of the work lying between the exterior rails of the tracks of the road, and for a distanc of two feet from and exterior to the track on each side thereof, and of keeping the same in repair; *but the said railroad company, having conformed to the grade established by the Commissioners, may use cobble-stone or Belgian rock in paving their tracks, or the space between their tracks, as the Commissioners shall direct.*" (19 Stat. 93.)

Under this law the pavement was constructed of asphalt, but Congress, while leaving the material of the new pavement to the discretion of the Commissioners authorized by the act to be appointed, excepted from such discretion the part of the avenue used for railway purposes.

3. That the duty of the plaintiff in error was not to lay down at its expense new pavements in the spaces mentioned, when they were already well paved and in good order, is further shown by the conduct of the parties. The plaintiff in error, when it constructed and laid its line of railway between 17th street west and the Capitol, in about 1864, promptly paved the said spaces without any direction on the part of the defendant in error, and thereafter kept them well paved and in good order. (R. 36, 37.) The act of the Legislative Assembly, dated July 10, 1871, and the Comprehensive Plan therein referred to, are in the record. (R. 74, 76.) There is in them not the remotest allusion to any duty on the part of the plaintiff in error, or to any change in the pavements in the said spaces. On the contrary, it is perfectly apparent that the improvements authorized were to be paid for by the defendant in error and by assessments upon the property-holders in the usual way. (R. 74, sec. 4.) The act is just what it would be if the plaintiff in error had no duty whatever, or, indeed, no existence. The work involved in this case was done in 1871, 1872, 1873, and 1874. The Board of Public Works, the agent of the defendant in error, claimed the exclusive right and duty to pave from

curb to curb, including the said spaces, with such material as it might select, and, in pursuance of such claim, made the contracts for the entire roadway from curb to curb, and under them did the work. The evidence is most explicit on this point. The action of the Board was without the slightest reference to any duty on the part of the defendant in error. (R. 37, 55, 56.) As the work was done the cost was from time to time assessed as in other cases. Two-thirds of the cost was paid by the defendant in error and one-third was specially assessed against the property fronting the improvements (R. 38). The charter of the plaintiff declares that its road shall be deemed real estate. (R. 66, sec. 2.) In two instances the road was assessed as *property fronting the improvements.* These assessments are dated September 2, 1872, and November 22, 1872. They were made, not against the plaintiff in error under its charter duty, but against the road as real estate, or, as stated in the bill of exceptions, "on account of this railroad as the owner of property abutting upon the avenue or street." Of course, the pretext that the road could be specially assessed as real estate abutting upon the improvement was abandoned. In no other instance was any assessment made, nor was any other charge at any time made against the plaintiff in error until after the passage of the acts of Congress of June 19, 1878, and June 27, 1879, when the amounts ~~remitted~~ assessed to property-holders were *assessed* without any shadow of authority against the plaintiff in error. (R. 38, 39, 54.)

If the defendant in error had any claim it was for work done which the plaintiff in error was bound to do, and the subject of a personal action, but in no sense of an assessment. Of that hereafter, however. Suffice it for the present to say that, until after the above acts, there never was any assertion, claim, or pretence that the plaintiff in error was bound to pay for the paving of the spaces. On the contrary, the whole conduct of the defendant in error shows that the spaces were paved by it

or its agent on its own account and at its own expense, and irrespective of any duty or liability on the part of the plaintiff in error. As to practical construction by parties of executory contract involving a similar duty, *Chicago* v. *Sheldon*, 9 Wall. 54.

4. It is submitted, therefore, that the measure of duty of the plaintiff in error, as carefully defined by the fourth section, to keep "at all times well paved and in good order" the spaces therein mentioned, is clear beyond cavil, and that it was just what the terms of the section declare, and not a duty to repave at the direction of the defendant in error, notwithstanding the spaces were in the condition prescribed. The provisions of that section, accepted by the plaintiff in error, constituted a *contract*, subject, of course, to repeal and amendment by Congress. It remains to examine the grounds upon which this contract was abrogated by the court below by substituting an essentially different duty. When this case was put before the court in general term on demurrer the point under discussion was not presented. It could not be until the condition of the spaces was developed in evidence. After the verdict and judgment the case was again before the court in general term, and its opinion will be found reported in 4 Mackey, 214, *supra*.

The duty as defined by the fourth section is practically conceded to be as now contended, but it is held that two other provisions of the charter modify the duty so defined. These provisions are the proviso at the end of the first section of the charter (R. 66) and the fifth section. (*Id.*)

The first section (R. 65) will be found to give authority to construct and lay down the railways and to run public carriages thereon drawn by horse power, and to receive a certain fare, and then comes the proviso that "the *use* and *maintenance* of the said road shall be subject to the *municipal regulations* of the city of Washington within its corporate limits."

It is seriously argued that this proviso, relating in general terms to regulating the *use and maintenance of the*

road, and silent as to the subject of duty to keep well paved and in good order the spaces mentioned, and having abundant scope for operation without trenching upon that subject, works a repeal in part of the fourth section, where that subject is specifically treated and the duty defined. It seems that to state such a proposition is to answer it. The proviso is found at the end of a section relating to matters requiring proper police regulation, and although the proviso may not be confined to those matters, its whole purpose evidently was to subject the plaintiff in error, in the use and maintenance of its road, to such regulation. Indeed, this is just what the proviso says. In the use and maintenance of a city railroad there is always need of municipal regulation. Even assuming that the duty involved in this case to keep well paved and in good order part of the roadway might be the subject of such regulation, yet regulation is one thing and the change of a charter duty and contract quite another. To go beyond the power of regulation and hold that Congress intended by the proviso to invest the municipality with power to abrogate the explicit duty and contract contained in the fourth section would be to place the whole charter at its mercy. It would be to clothe the municipal body with the power of general legislation, including the right to impose a burthen upon the plaintiff in error essentially different from what Congress had thought fit to impose.

Next as to the fifth section.

With great deference to the court below, it is submitted that the meaning of that section was utterly misapprehended. Carefully read, it will be found to have no relation whatever to the duty prescribed by the fourth section, but to impose another and different duty. The fifth section assumes that in the future, owing to a change of grade, or, without such change, to an improvement of the streets and avenues, it might be necessary to change the location of the railroad so as to make it conform to

the new state of things, and provides that in any such event the plaintiff in error should at its own expense make such change.

The third section of the charter required the railroad to be laid in the *centre* of the streets and avenues. (R. 66.) That such was the whole purpose of the fifth section is demonstrated by the duty imposed. What is that duty? Not to pave, but to change the railroad so as to make it conform. In this duty to "change the railroad" the court below found sufficient material for the construction of a duty to pave at the direction of the defendant in error the spaces mentioned in the fourth section, which spaces had never before been comprehended in the meaning of "railroad," the thing to be changed or moved.

Throughout the work the plaintiff in error, at its own expense, duly changed its railroad whenever such change was necessary. (R. 37.)

The argument of the court below assumes that what is meant in the fifth section by an "improvement" is a new pavement. The answer is that the improvement referred to by the fifth section is not any improvement in a general sense, but any improvement *requiring the railroad to be moved*, in which case, and in which case only, the duty to change or move is imposed.

But the construction of the fifth section was not an open question in the court below, having been settled by this court in the case of *Washington and Georgetown Railroad* v. *The District of Columbia*, decided in 1883, and reported in 108 U. S., 522.

In that case, which arose under the act above mentioned for the repavement of Pennsylvania Avenue, this court found the duty of the appellant, the Washington and Georgetown Railroad Company, in the fourth section of its charter, which is identical with the fourth section of the charter of the plaintiff in error, except that the former extends to expense to Georgetown as well as to the United States and Washington; and as to the fifth

section, identical with the fifth section of the charter of the plaintiff in error, except in the above particular, says: "The fifth section *requires the company to conform their road to any change of the grade of the street*, and the sixth, that the act may at any time be altered, amended, or repealed by Congress." (p. 523.)

Reference is made in the opinion of the court below (p. 218) to the large powers conferred upon the new government created by the act of Congress of February 21, 1871. Those powers were undoubtedly very large, but the question here is the measure of duty of the plaintiff in error as prescribed by its charter in 1864. It will hardly be pretended that the measure of duty so prescribed could be in any degree changed by the new government, or that it was not bound by the charter contract. Even if it could be assumed that there was the power to change, there is no pretence that the exercise of such power was ever attempted. Whatever the powers of the new government, the duty of the plaintiff in error continued as originally prescribed.

Even if the new government had the despotic power exercised by the Board of Public Works, its agent, it had to pay the expense of work done thereunder, and could not throw such expense upon the plaintiff in error beyond its charter duty.

The defendant in error and its agent, the Board of Public Works, acted in conformity with this principle. By their conduct they said in substance: We have entire control of the streets and avenues and will pave them according to our discretion. The duty of the plaintiff in error has been performed, as the spaces to be kept by it well paved and in good order are in such condition, but such performance only exempts it from expense, and over and above such performance we have the right to pave at our own expense. Such was substantially their action.

5. Even if the duty of the plaintiff in error was subject to the judgment or direction of the defendant in error, so

that the plaintiff in error was bound to keep not only well paved and in good order, but in such condition as the defendant in error might direct, still the duty was one to be performed by the plaintiff in error and nobody else, and involved the correlative right to perform, and the plaintiff in error was entitled to the plain and unequivocal declaration that the existing pavements in the spaces were, in the judgment of the defendant in error, unsuitable, and that the new ones should be laid. If A covenants to keep a road in order at the will of B, he is, as part of his covenant, entitled to such will. So, here, the exercise of the judgment of the defendant in error was a right of which the plaintiff in error could not be deprived. The defendant in error was then a municipal government, with a legislative department, through which alone it could exercise such judgment, and the only legislative act in relation to new pavements (R. 74) fails to show that the existing pavements of the spaces were deemed unsuitable, and that the plaintiff in error should lay new ones. The act in question is as reconcilable with the continuance of the existing pavements in the spaces as with the laying of new ones therein. It was not for the Board of Public Works, the mere statutory agent of the defendant in error, (Barnes *v.* District, 91 U. S. 540,) to exercise such judgment. Even if it was, there is no pretence it ever exercised it so as to afford an opportunity to the plaintiff in error to discharge its alleged duty.

6. The court further erred in respect of the duty of the plaintiff in error as to the time when it commenced and became operative.

This is the subject of the third assignment of error.

The duty of the plaintiff in error, as defined by its charter, was "to keep said *tracks*, and for the space of two feet beyond the *outer rails thereof*, and also the space between the *tracks*, at all times well paved," &c. It seems manifest that the duty thus defined contemplated the completion of the construction of the railway by laying

the tracks, including the rails. The design of Congress evidently was that such completion should be such an occupation of a street or avenue as would throw upon the plaintiff in error the prescribed duty. But the court ruled otherwise and held that the duty was on the plaintiff in error, notwithstanding the conditions of the duty did not exist and the plaintiff in error was not in default.

By the seventeenth section of the charter the defendant was required to make and complete its railroad between the Capitol and 17th street within four months after it was organized, and on the other routes named therein within one year after the organization of the company.

By an act approved January 30, 1865, the charter was amended so as to extend the time for the completion of the line for one year from the passage of the act, except the line from 17th street and the Capitol, which was required to be completed, equipped and in running order within thirty days from the passage of the act. (R. 71.)

By another act, approved March 3, 1865, the defendant's charter was again amended, and authority thereby given to the defendant to lay a double or single track in certain streets and avenues not mentioned in the original act of incorporation, "with the privilege of extending, *at any time*, the road now in operation from 17th street west to the Capitol, from the present terminus of said road on A street north, along A street north to 1st street east, along 1st street east to East Capitol street, along East Capitol street to 9th street east, along 9th street east to L street south. And the 17th section of the act of incorporation was so amended as to allow the defendant three years from the date of the approval of the act in which to complete the railways therein described, as well as those described in the act of incorporation. (R. 71, 72, 73.)

By an act approved March 2, 1867, the time for the completion of the defendant's road, as authorized by the act of incorporation, except that part between 17th street and the Capitol, was extended for three years from the first day of January, 1866. (R. 73.)

Resolution of Board, R. 53.) If fraud was imputed, it was a question of fact for the jury, but the court held the plaintiff in error liable as matter of law.

The court will recognize the fact that when the work was done the northwest section of the city was entirely undeveloped, and other streets and avenues very different in respect of population from what they are at present. The completion of the railways, if it involved the large amount now claimed, followed by keeping up this unremunerative operation, would have destroyed the plaintiff in error.

As said above the conduct of the plaintiff in error was with the full knowledge and concurrence of the authorities. More than that: The plaintiff in error offered to prove that it had determined to avail itself of the delay allowed by law, and to use in any manner the streets and avenues until after the new pavements were laid, and communicated such determination to the Board of Public Works, and that the said board thereupon agreed that if the plaintiff in error, in the progress of the work, would lay its cross-ties and sleepers, and thereby prevent the necessity of tearing up the pavements in the future, the laying of such cross-ties and sleepers should not involve any liability on the part of the plaintiff in error, and that confiding in said agreement the plaintiff in error laid the cross-ties and sleepers, and that the above letter and resolution were in pursuance of such agreement. (R. 55.)

This offered evidence was excluded by the court (R. 55) and constitutes the fifth assignment of error.

Such exclusion was erroneous. The evidence was admissible as explanatory of the conduct of the plaintiff in error, given in evidence by the defendant in error, and to show that what was done was for the convenience of the defendant in error, and with the agreement that it should impose no liability on the plaintiff in error, but that it should stand, "in respect of liability, as if the cross-ties and sleepers had not been laid by it."

Apart from the effect of the offered evidence as an agreement, it was surely admissible to show *intention* and *good* faith.

II.—Demand and Refusal or Neglect.

No Action Taken by the Defendant in Error upon any Alleged Default of the Plaintiff in Error.

This is the subject of the sixth, seventh, eighth, and tenth assignments of error.

The duty prescribed by the law was imposed upon the *plaintiff in error.*

The language of the charter is that "*the said corporation hereby created shall be bound to keep,*" &c. (Sec. 4, R. 66.) The duty is not to pay the expense of work to be done by the defendant in error, but to do the work.

Thus, even if the time when new pavements should be laid in the spaces, and the material or character of such pavements, depended upon the discretion or judgment of the defendant in error, there can be no doubt that the work of laying the new pavements belonged to the plaintiff in error.

Then, could the plaintiff in error be made the debtor of the defendant in error without demand and refusal or neglect? The general rule is, that to entitle a person to recover for money paid for another there must be a request, express or implied, or an express promise to repay. A person cannot, by officiously or recklessly assuming to discharge the duty of another, change the legal state or position of the latter. It is the right of every person to say what relation he will hold to an alleged claim, and whether he will pay it or not; and if another person, in disregard of this right, voluntarily assumes to change his relation thereto, he does so at his own cost and cannot charge such other with liability. Thus, when a town voluntarily paid the entire fees of the commissioners appointed by the legislature for establishing the boundary line between it and another town, under a resolution of

the legislature that the expense should be paid by them, each paying one-half, it was held that the half paid for the benefit of the other town could not be recovered from it, as it was paid voluntarily and without any request from it, express or implied. (*South Scituate* v. *Hanover*, 9 Gray, 420. See also to the same effect, *Bancroft* v. *Abbott*, 3 Allen, 524; *Chrisman* v. *Levy*, 1 Ind., 212.

This subject is treated at great length in Wait's Actions and Defenses, Vol. 4, 454, 455 and 457, and the authorities examined. There are exceptions to the general rule. There are instances where the obligations imposed upon a person to do an act, and the necessity for its being done at once, is such that upon such person's neglect or refusal to do it, any person may, without any request or promise from the person upon whom the obligation rests, procure it to be done, and recover cost in an action for money paid, the law implying a request to any person to do it.

Thus, the husband is bound, after the decease of his wife, to provide her with a funeral at a reasonable expense, and if he does not do so, it has been held that any person who voluntarily employs an undertaker and pays him for the funeral, may recover from the husband in an action for money paid. (*Ambrose* v. *Kervison*, 10 C. B., 776, cited 4 Wait, 456, with other cases of the same kind.)

It will hardly be pretended that the doctrine of these cases has any application to the present, in which the court *subverted* and *inverted* the general rule by holding that unless the plaintiff in error offered itself ready to do the work, "*as soon as it had notice or knowledge* that the municipal authorities had directed new pavements to be laid," and even commencing the work, the defendant in error was entitled "forthwith" to do the work at the expense of the plaintiff in error, without any regard to any pressing exigency, or requiring such exigency, of which there was not a particle of evidence to be found by the jury.

Another exception, the one relied on by the court below, is that when there is *a legal obligation* on the part of the

person paying, to pay the money, the primary obligation resting upon the person for whose benefit it was paid, the law implies a request and a consequent promise that will uphold an action to recover it back. (4 Wait, 453.)

But, in this case, where was the legal obligation upon the defendant in error to pave the spaces? That obligation was expressly imposed upon the plaintiff in error, and this fact is entirely lost sight of by the court below. The only obligation here to pay money was one created by the usurpation of a right and duty by law imposed upon the plaintiff in error, and it could hardly be contended, and was not contended, that such was the obligation referred to. The court below, however, did contend that the relation of the defendant in error to the plaintiff in error, as decided by this court in *Barnes* v. *The District of Columbia*, ~~1 MacArthur, 322,~~ 91 U.S. 540 was that of surety to principal, and that, as the defendant in error was responsible to third parties for the condition of the spaces, it had a right to pave them. But the question here is, whether it had the right to pave without first affording the plaintiff in error an opportunity to discharge its duty. Could the defendant in error usurp such duty, and thereby violate the law and make such usurpation and violation the predicate of a right of action?

All the cases cited by Mr. Wait are cases where the party paying was responsible fer the debt, though not primarily. The debt was the debt or duty of the party paying and hence a request was implied by law.

Not one of the cases asserts that, in the case of a public highway, a corporation responsible for its condition, when the duty to pave and keep in order is by law devolved upon another, has the right to discharge that duty, even when the highway is out of repair, without demand and refusal or neglect. The authorities are just the other way, as will presently be shown.

The court below, however, confined such right to cases where the condition of the street was unsafe. The argu-

ment of the court is, that as such unsafe condition might involve responsibility on the part of the defendant in error for injuries to third parties, it ought to be allowed to make another its debtor without the usual prerequisite of demand. Unfortunately for the argument, the postulate of the ruling was not such unsafe condition, and the evidence of the defendant in error itself conclusively proved that its legal obligation had been fulfilled, and the spaces were "well paved and in good order." There was no question as to the safe condition of the spaces, or that the existing pavements in them were as completely a discharge of the obligation by the plaintiff in error as the new pavements possibly could be.

That the alleged relation of principal and surety does not, even in the case of a street in an unsafe condition, absolve from the necessity of a demand is shown by the cases of *Pennsylvania R. R. Co.* v. *Duquesne Borough*, 46 Pa. State, 224; *Phœnixville* v. *Phœnixville Iron Co.*, 45 Pa. State, 137, and *Oconto* v. *Chicago and Northwestern Railway Co.*, 44 Wisc. 231. All these cases are cited with approval in the opinion upon the demurrer, but upon another point. To quote only from the last, which the opinion says "is very much like the one before us." The court below had instructed the jury (p. 234) "that to entitle the plaintiff to recover it must prove . . . (2) that before the city undertook, by its street commissioners, to repair such streets and sidewalks, defendant, its agents or its officers in charge of the road, *were requested by the city to make the necessary repairs, and had reasonable time and opportunity to do so* before the city authorities undertook to do it." This instruction was approved, and in deciding the case in the appellate court, Cole, J., says (p. 241): "We must assume that the jury found, under the direction of the court, that the agent of the company having charge of building the road was notified and requested by the city authorities to make the necessary repairs, but wholly neglected or failed to make them." (See also *Combe* v. *Green*, 11 M. & W. 480.)

But even if the rule was as laid down by the court, the inverse of the general rule, and if the postulate of the right of the defendant in error to make the plaintiff in error its debtor, was not demand upon the latter, and its refusal or neglect, but its failure to "offer itself ready," surely such offer was unnecessary after the Board of Public Works had declared its interpretation of its powers and determination to pave the spaces. To "offer itself ready" was an empty form under the circumstances as detailed in the evidence. (R. 55, 56.)

The attention of the court is especially called to the fact that the defendant in error never acted upon any alleged default on the part of the plaintiff in error. The case is not one like those cited above, where the default of the party owing the duty is reported to the municipality, and thereupon the latter directs its officers to discharge the duty. On the contrary, it is not pretended here that any default of the plaintiff in error was ever made known to the defendant in error, or that the latter at any time gave any directions as to what should be done in consequence of such default.

III.—Interpretation and Claim.

This is the subject of the ninth assignment of error.

The defendant in error interpreted its powers, and did the work at its peril. Its mistake of law could not make the plaintiff in error its debtor. The work was done, not under any claim that the duty to do it belonged to the plaintiff in error, but in repudiation of any such claim and in assertion of the claim that the duty and correlative right were devolved by law upon the defendant in error. Thus the defendant in error took the risk.

In *Homestead Co.* v. *Valley R. R.* (17 Wall. 166), a party claimed to own the land in litigation, and paid the taxes. After the case was decided against him, he claimed that his adversary was bound to refund the amount paid for taxes.

This court says (p. 166):

"It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged to be in the defendants on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts. It is an elementary proposition, which does not require support from adjudged cases, that one person cannot make another his debtor by paying the debt of the latter without his request or assent.

"It is true, in accordance with one decision, the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them, without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title, have risked too much, it is their misfortune, but they are not on that account entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit."

Mayor, &c., of Balto., *vs.* Hughes, 1 G. & J. 480, 498.

4 Wait's Actions and Defences, pp. 450, 454, 457, 462, and cases cited.

Broome's Legal Maxims, pp. 255, 256, etc.

R. R. *vs.* Commissioners, 98 U. S. 545.

R. R. Co. *vs.* Soutter, 13 Wall. 517.

Detroit *vs.* Martin, 34 Mich. 170; 22 Am. Rep. 512, and note, p. 519.

Black *vs.* Ward, 27 Mich., 191; 15 Am. Rep. 162, and note, p. 171.

Radich *vs.* Hutchins, 95 U. S. 210, 213.

Mayor, &c., of Balto., *vs.* Lefferman, 4 Gill, 425; 15 Am. Rep. and note, 153.

Regan *vs.* Baldwin, 126 Mass. 485; 30 Am. Rep. 689,

IV.—The Effect of the Ratification of Assessments as made by the Acts of Congress of June 19, 1878, and June 27, 1879.

This is the subject of the eleventh assignment of error.

The acts of Congress are as follows:

"An Act to provide for the revision and correction of assessments for special improvements in the District of Columbia and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioners of the District of Columbia be, and they are hereby, directed to enforce the collection, according to existing laws, of all assessments for special improvements prepared under an act of the legislative assembly of August tenth, eighteen hundred and seventy-one, as charges upon the property benefitted by the improvements in respect to which said assessments were made: *Provided*, That upon complaint being made to the Commissioners, within thirty days from the passage of this act, of erroneous or excessive charges in respect to any of said assessments which remain unpaid, said commissioners are hereby authorized to revise such assessments so complained of, and to correct the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificate a draw-back certificate for the amount of such erroneous or excessive charges, which certificates shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the manner prescribed for the redemption and purchase of certificates, as provided by an act of the legislative assembly of May twenty-ninth, eighteen hundred and seventy-three, entitled 'An act for extending the time of payment of special assessments, and for other purposes,' after the provisions for the purchase and redemption of certificates named in said act shall have been fully carried out.

"Approved, June 19, 1878."

"Sec. 3. That the Commissioners of the District of Columbia are hereby authorized and directed, upon written complaint being made to them within sixty days from the passage of this act, by any person or persons who had, prior to June nineteenth, eighteen hundred and seventy-eight, paid their special improvement taxes pre-

pared under an act of the legislative assembly of said District, of August tenth, eighteen hundred and seventy-one, that their said assessment or assessments were erroneous or excessive, to revise and correct such assessments so complained of; and in case the amount of any such assessment is found to be erroneous or excessive, the Commissioners shall issue to the person entitled to the same a drawback certificate for the amount of such excessive or erroneous charge, which certificate shall be received in payment of all special assessments, and for all general taxes due before the first day of July, eighteen hundred and seventy-seven: *Provided*, That complaints filed under the act of June nineteenth, eighteen hundred and seventy-eight, (paid or unpaid,) by a property-holder, his agent or attorney, need not be refiled under this act.

"Approved June 27, 1879."

The cost of paving the spaces was, in common with that of paving the residue of the streets and avenues, assessed two-thirds to the defendant in error and the other one-third against the abutting property.

For the evidence as to the assessments, see R. 38, 39.

This court, in the case of *Mattingly* v. *The District of Columbia*, (97 U. S. 687,) had occasion to construe the above acts. It held that they, and all antecedent legislation, ratified and confirmed the assessments as made, subject only to the relief for the benefit of the owners of abutting property specially provided for. The only revisions authorized by the said acts were at the instance of those parties, within the time mentioned, subject only to the obligation to REMIT as provided, for the assessments as they stood were absolutely ratified and confirmed, as held by this court.

It was never intended that after the work had been done by the defendant in error and paid for by money and special assessment certificates, and assessed in the usual manner and the assessments ratified and confirmed, and after the lapse of years the assessments thus ratified and confirmed should be changed, so as to impose new charges upon the plaintiff in error and other parties.

Any assessment against the plaintiff in error was in palpable violation of law. Even if the spaces had been paved by the defendant in error, under such circumstances as would give a right of action against the plaintiff in error, such right of action was not the subject of an assessment under the laws of this District, and the new assessment could only have been resorted to that some sort of color might be given to a claim not pretended to have any existence until after the passage of the above acts.

V.—The Measure of Damages.

This is the subject of the twelfth assignment of error.

The error of the court below in its ruling upon this point is, it is submitted, manifest, and requires no comment.

VI.—Limitation.

This is the subject of the thirteenth and fourteenth assignments of error.

There are six questions which arise under the point of limitations, namely:

1st. Is the plaintiff below a municipal corporation?

2d. If it is a municipal corporation, can the statute of limitations be pleaded to *any* action brought by it?

3d. Does the cause of action set forth by the plaintiff below come within the provisions of the statute of limitations in force in the District of Columbia?

4th. Are municipal corporations comprehended under the general term, "*person or persons,*" and "inhabitants," contained in the statute in force in the District?

5th. Is the action brought to recover a *public tax or assessment* levied under authority of law or anything analogous thereto?

6th. Did the cause of action accrue more than three years before the commencement of the action?

These questions will be considered in their order.

I.

The Defendant in Error is a Municipal Corporation.

The amended declaration alleges that the plaintiff is "*a body corporate.*" There is no question but that the plaintiff is and was at the commencement of the action *a municipal corporation.* The act of Congress of February 21, 1871, chap. 62, sec. 1, creating the District government, provides:

"The district is created a government by the name of the District of Columbia, by which name *it is constituted a body corporate for municipal purposes*, and may contract and be contracted with, *sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation* not inconsistent with the Constitution and laws of the United States and the provisions of this title." (Rev. Stat. D. C., Sec. 2.)

And the act of Congress of June 11, 1878, providing a permanent form of government for the District enacts:

"The District of Columbia shall remain and continue *a municipal corporation*, as provided in section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation."

Rich. Sup. to Rev. Stat., p. 340.

And the Supreme Court of the District, which is presumed to understand thoroughly the nature and character of the District government, in its opinion sustaining the demurrer to the defendant's pleas of limitation, says:

"Its (the District's) liability to be sued and impleaded to the full extent of other municipalities is plainly implied in the general language which creates it 'a body corporate for municipal purposes,' and we are of the opinion, in the absence of any provision to the contrary, that whatever liabilities may properly attach to municipalities in general are equally devolved upon the District government; *and hence, that wherever the statutes of limitations of Maryland may be interposed to a claim of an ordi-*

nary municipality it may be availed of against the District of Columbia."

R., 14, 15; 1 Mackey, 371.

II.

THE DISTRICT, THEN, BEING A MUNICIPAL CORPORATION, THE STATUTE OF LIMITATIONS CAN BE PLEADED WHERE IT COULD BE PLEADED AGAINST A NATURAL PERSON.

Judge Dillon, in his treatise on Municipal Corporations, says:

"Although municipal corporations are considered as public agencies, exercising, in behalf of the State, public duties, there are many cases which hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects all real and personal actions, run in favor of *and against* these corporations, in the same manner and to the same extent as against natural persons."

Dillon on Munc. Cor. (3d ed.), sec. 668.

Mr. Wood, in his work on the Limitation of Actions, published in 1883, says:

"The maxim, *nullum tempus occurrit regi*, only applies in favor of the sovereign power, *and has no application to municipal corporations deriving their authorities from the sovereign*, although their powers, in a limited sense, are governmental. *Thus the statute runs for or against towns and cities, and also for or against counties, in the same manner as it does for or against individuals.* In some of the States the statute is, in terms, extended to towns, cities, and counties; *but, independent of such provisions, the rule is as stated supra.*"

Wood on Lim. of Actions, pp. 93, 94.

We propose to cite some of the cases holding that limitations can be pleaded against a municipal corporation in relation to both real and personal property.

The case of *Lessee of the City of Cincinnati* v. *The First Presbyterian Church*, 8 Ohio, 298, was decided in 1838. It was an action to recover certain lots in Cincinnati originally belonging to the city. The defendant pleaded the statute of limitations—twenty years' adverse possession.

LANE, J., delivering the opinion of the Supreme Court of the State, says:

"The principle that the sovereign power of a State is not bound by statutes of limitation, without express words, obtained in the earliest stages of the common law, and has descended to this day. This immunity seems to be, *an attribute of sovereignty only.* No case is found in the books which exempts any other description of person, whether natural or *artificial,* from the operation of the laws; and none of the reasons for the exemption apply with much force to municipal corporations. The law impresses upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end. *When the property is their own,* the statute has been always held as binding; when their land or franchises *are of a public character,* the public which they represent are principally members of their own body, sufficiently vigilant to watch their own interests, and sufficiently powerful to defend them. The rights of the corporation, therefore, seem well enough protected, without invading the letter of the statute. And the very loose and indefinite character of some of these rights, renders the protection of the law peculiarly necessary for the security of occupants."

The doctrine of the case last cited was reaffirmed in the strongest terms in *The City of Cincinnati* v. *Evans,* (5 Ohio St. R. 594), decided in 1855.

RANNEY, C. J., delivering the opinion, and referring to the First Presbyterian Church case (supra), says:

"Municipal corporations are subject to the operation of the statute of limitations, in the same manner and to the same extent as natural persons, and, as a consequence, that notorious and uninterrupted possession by a private individual under a claim of right of land dedicated to a city for streets or public squares for more than twenty-one years will bar the claim of the city to its use. This case (The First Presbyterian Church case) was decided in 1838; was fully argued by eminent counsel, and carefully considered by the court. In following it now we not only yield to the respect due to a decision of the court of last resort, which has so long been supposed to settle the law, *but with a full approval of the principles upon which it is founded.*"

In *Lane* v. *Kennedy* (13 Ohio St. R. 42), decided in 1861, the court, after referring to the two last cited cases, say:

"It is undoubtedly true that the town of Oxford, which had the custody and control of the street at the time it was encroached upon, *like all other municipal corporations*, is subject to the operation of the statute of limitations, in the same manner and to the same extent as natural persons."

In *Evans* v. *Erie County* (66 Pa. St. 222), *decided in* 1870, the above cited case of *City of Cincinnati* v. *Evans* (5 Ohio St.) is cited with approbation.

SHARSWOOD, J., rendering the unanimous opinion of the court, says:

"That the statute of limitations runs against a county, *or other municipal corporation*, we think cannot be doubted. The prerogative is that of the sovereign alone, *nullum tempus occurrit reipublicæ*. Her grantees, through artificial bodies created by her, are in the same category with natural persons. *Glover* v. *Wilson*, 6 Barr, (6 Pa. St. R. 290;) *City of Cincinnati* v. *Evans*, 5 Ohio St. R. 594."

Armstrong, Chairman, &c. v. *Dalton, Exr.*, 4 Devereux (Nor. Car.) 568.

This was an action of *assumpsit*, commenced in 1833 by the plaintiff as chairman of Stokes County Court (he being enabled to bring it by an act of assembly) against the defendant as executor, for money paid to his testator as Treasurer of Public Buildings, and not accounted for. The defendant pleaded the statute of limitations. The opinion in this case has been referred to with approbation in many of the States.

The court say:

"It is a well settled principle that the statute of limitations does not run against a State. But does the rule extend to actions brought by a county, or in the name of any officer or person for the benefit of a county? . . . Public corporations, as distinguished from private corporations, are such as exist for public political purposes only, such as counties, cities, towns and villages. They are founded by the government for public purposes, and the

whole interest in them belongs to the public, viz: to the county, towns, &c. But the reason which upholds the rule *nullum tempus*, &c., which applied to the sovereign, does not, in our opinion, excuse the laches of the officers of these small communities. The plea of *nullum tempus*, &c., is, as before mentioned, one that peculiarly belongs to the sovereign, or to the commonwealth, to be exercised for the public good. The King or the State cannot be presumed to mean wrong, or to have an interest inconsistent with justice. But these communities, like the individuals who compose them, have no such legal presumption in their favor. *No authority is shown to support the position*, that they are not like other corporations or private persons, subject to the operation of the statute of limitations, nor can we see any reason which can bring them within the exception which is admitted to apply to the sovereign and the State."

In *County of St. Charles* v. *Powell*, (22 Mo. 525), decided in 1856, it is held that the statute runs against the municipal corporations and other authorities established to manage the affairs of the political subdivisions of the State, and the above cited cases of the *City of Cincinnati* v. *The First Presbyterian Church* (8 Ohio), and *Armstrong* v. *Dalton* (4 Dev.) *are cited with approbation.*

School Directors of the Township of St. Charles v. *Georges*, (50 Mo. 194), decided in 1872. This was an action of ejectment for a lot in St. Charles. The plaintiff claimed title under acts of Congress, whereby the lot in question was set apart and donated to it for school purposes. The defendants claimed title by adverse possession for more than ten years.

The court say:

"The rule of the common law (*nullum tempus. &c.*), does not apply to any of the subdivisions of the State, *such as counties, cities, or municipal corporations, or to any corporations, private or public*, and unless such corporations are excepted from the statute of limitations, they are comprehended therein under the general term, *persons.*"

The latest case we have found on the subject, namely, *City of Fort Smith* v. *McKibben*, (41 Ark. 45), was decided

in 1883. The reasoning of the court strikes us with great force.

The court say:

"The question may be presented thus: Is a city, town, corporation, with respect to property or powers which it holds in trust for the public, bound by the statute of limitations, so as to be precluded by lapse of time and adverse holding from claiming to control the property, or exercise the power? With regard to property, *or contract rights which the municipality claims for its own convenience as a corporation*, there is little difficulty. Almost, if not quite, all the authorities concur in holding, in such cases, *that it is amenable to the statute*, and we think it obvious it should be, on principle. *Quoad hæc*, it does not represent the sovereignty of the people, but only itself, and the local interests of citizens.

"The trouble arises where the powers are held in trust, *not for the members of the body corporate alone, but for the whole people who may come to the city.* The most common cases are those arising with regard to the use of streets, squares, parks, and commons, which have been dedicated to the public. Appellees contend that in this respect alleys do not stand upon the same ground with streets and squares; but waiving that for the present, we will consider the question with regard to all.

"If municipalities are not bound by statutes of limitations with regard to these *public trusts;* that is, with regard to their power to keep open streets, &c., it must be upon the maxim that *nullum tempus occurrit regi;* and that municipalities are the adjutants of government, and have the franchise of sleeping upon their rights; or, rather, that the public must not suffer from their neglect.

"But municipal corporations are not really the State, nor are their functions and powers conferred principally for the benefit of the whole people of the State, although, incidentally, they hold some trusts, in the exercise of which any citizen of the State may become to be interested. It may well be doubted whether the reason of the maxim may not be strained too far in applying it to these bodies. That 'the time and attention of the sovereign must be supposed to be occupied by the cares of government,' might well have excused a king from asserting his rights, but affords no reason why the officers of a corpo-

ration should not be reasonably diligent in the discharge of the very duties they were selected to execute. Nor does it afford a reason why citizens, daily sensible of an encroachment on their common rights, should be allowed to remain dormant for many years, and then assert them to the detriment of others. The maxim would become the instrument of wrong. The more wholesome rule for the citizen, individually and collectively, is, that the laws favor the vigilant only, and not the careless and slothful."

In *Dudley* v. *Trustees of Frankfort*, 12 B. Mon. (Ky.), 611, the court say:

"*A municipal corporation, or any other artificial body vested with corporate rights and franchises, have no more right than a natural man* to claim the benefit and advantage of the maxim *nullum tempus occurrit regi.*"

In addition to the cases already cited, the doctrine that the statute of limitations runs against a municipal corporation is amply supported in the following cases:

City of Pella *v.* Scholte, 24 Iowa, 283, (Opinion by Judge Dillon);

Inhabitants of Kennebunkport *v.* Smith, 22 Me., 445;

Town of North Hempstead *v.* Town of Hempstead, 2 Wend., 109;

Rowan's Ex'rs *v.* Portland, 8 B. Mon. (Ky.), 232.

Inhabitants of Litchfield *v.* Wilmot, 2 Root (Conn.), 288;

Alves' Ex'rs *v.* Henderson, 16 B. Mon. (Ky.), 131.

City of Wheeling *v.* Campbell, 12 W. Va., 36, decided in 1877;

Forsyth *v.* Wheeling, 19 W. Va., 318;

City of Galveston *v.* Menard, 23 Texas, 349;

See Kelly's Lessee *v.* Greenfield, 2 Har. & McH. (Md.), 121;

Russell *v.* Baker, 1 Har. & J. (Md.), 71.

These last two cases hold that, under the charter of Maryland, the proprietary was not entitled to the prerogative maxim, *nullum tempus, &c.*

It will be observed that all the cases heretofore cited announced the broad principle that, *in every case*, the statute of limitations may be pleaded against a municipal corporation with the same force and effect as it could be pleaded against a natural person, and that the public may even lose their right to *public streets, avenues, and squares by adverse possession;* and this we believe to be the true doctrine; yet we are aware that the Supreme Court of Pennsylvania, in some early cases, has qualified this doctrine, and held that lapse of time furnishes no defence for an encroachment on a *public right*, such as an obstruction on a street or square dedicated to the *public at large.* The court say, in effect, that streets and public squares are dedicated or acquired for the *public use, and not alone for that of the people of the city*, the corporation being the mere trustee of the public; that erections by private persons on property thus dedicated or acquired cannot be authorized by the original proprietor, nor by the city corporation, and can be authorized only by act of the legislature; that unauthorized obstructions thereon are *public nuisances*, and may be prosecuted by indictment or other proceedings in behalf of the public, and that no length of time, unless there be a limit by statute, will legalize a public nuisance, or bar the right of the public to proceed by indictment to abate it, and that, in the absence of a grant from a competent source, no presumption from mere lapse of time can be made to support a nuisance, which is an encroachment on a public right. (See Dillon on Mun. Cor., 3d ed., sect. 669.)

The great weight of authority is against the doctrine of the court of Pennsylvania, qualifying and exempting, *in so far as encroachments upon public streets and parks are concerned*, the liability of a municipal corporation to have pleaded against it the statute of limitations; but even if we recognize the Pennsylvania doctrine to its fullest extent, *it plays no part in the case at bar.* The District is sueing to be reimbursed, *in money*, for an expense and out-

lay which, it claims, should have been borne by the defendant. The right to recover this money is not a *public right*, in the sense that a dedication of a street or park to the *public at large* is a public right. It is not a case "wherein the corporation represents the State, or is seeking to enforce a right pertaining to sovereignty." The money which the District expended in 1872–5 for the paving and grading in question belonged exclusively *to the people of the District;* the outside world had no interest in it whatever. It was collected exclusively from the people of the District, or they alone were liable for it. At the time the work was done, and the cause of action accrued, Congress had not assumed to pay a portion of the expenses of the District government, and the property of the United States, within the corporate limits, was never subject to taxation. Congress did not assume to pay a portion of the expense until the grading and paving was completed by the District. It assumed to pay one-half of the current expenses June 11, 1878. (Rich, Sup., p. 342.) The amended declaration alleges that the work was completed in the years 1872–4, except a small portion, $1,914.52 worth, which was completed in 1875. (R. 25–28.) The right of the District to be reimbursed for its outlay, if it has any at all, is a proprietary or private right, as distinguished from a public right referred to in the Pennsylvania cases; and as to private rights, Judge Dillon says: "The statute of limitations runs *in Pennsylvania* against municipal corporations. *Evans* v. *Erie County*, 66 Penn. St. R. 222. This case holds that, as respects *real property* owned by a municipal corporation, the statute of limitations applies the same as against other owners of private property."

It should be stated that the case in 66 Pennsylvania was decided in 1870, long after the other Pennsylvania cases referred to.

Judge Dillon draws the distinction between the public rights, referred to in the Pennsylvania cases, and the or-

dinary or proprietary rights of a municipality, and expresses the opinion that the latter only are subject to the statute of limitations. He says:

"Upon consideration it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, *a double character*—one public, the other (by way of distinction) private. *As respects property not held for public use, as streets, commons, &c., and, as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in action on contract or for tort, a municipal corporation may plead and have pleaded against it the statute of limitations.* But such a corporation does not own and cannot alien public streets or places, and no laches on its part, or on that of its officers, can defeat the right of the public thereto, yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public." (Dillon on Munc. Cor., sect. 675, 3d ed.)

The "*double character*," said to be possessed by municipal corporations in the Pennsylvania cases, is thus portrayed in *Simplot* v. *Chicago, Milwaukie and St. Paul Railway Co.*, Circuit Court Northern District of Iowa, decided in 1883, (16 Fed. Rep. 350.)

SHIRAS, delivering the opinion of the court, says:

"The true rule is, that where a municipal corporation *seeks to enforce a contract right, or some right belonging to it in a proprietary sense;* or, in other words, when the corporation is seeking to enforce the private rights belonging to it, as distinguished from the rights belonging to the public, *it may be defeated by force of the statute of limitations;* but in all cases wherein the corporation *represents the public at large, or the State, or is seeking to enforce a right pertaining to sovereignty*, then the statute of limitations, as such, cannot be made applicable. In the latter case the courts may apply the doctrine or principle of an *estoppel*, and by means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights."

The Supreme Court of Iowa, in 1868, unanimously affirmed the doctrine of the Ohio, Kentucky, and New York courts in *City of Pella* v. *Scholte*, 24 Iowa, 283, *and*

the opinion was rendered by Judge Dillon. This was a petition in equity filed by the City of Pella, in its corporate capacity, claiming, as against the defendants, that a certain block of ground was dedicated to the *public;* that the defendants deny the *public right,* and obstruct the public enjoyment of the square, and praying to have its right to the control of the square judicially settled. The defendants pleaded, *inter alia*, the statute of limitations, averring adverse possession.

DILLON, Ch. J., delivering the opinion of the court says:

"Of course it is well understood that statutes of limitations do not constructively apply to the State or sovereignty. But the principle has not, so far as we know, *been extended to municipal or public corporations.* On the contrary, it has been expressly held that these corporations are within the statute of limitations *the same as natural persons.* (*Cincinnati* v. *The Church*, 8 Ohio, 298, (1838,) followed in *Same* v. *Evans*, 5 Ohio St., 594, (1855.) See also *Rowan* v. *Portland*, 8 B. Mon. 250, 258; *North Hempstead* v. *Hempstead*, 2 Wend., 109, 137; *Denton* v. *Jackson*, 2 John's Ch., 320, 338.)

"Whether there may be some limitations on this general doctrine arising out of the want of knowledge of the public or corporation, or its officers, of its rights, or of the adverse right sought to be asserted against it, we need not stop to examine, for in this case the right claimed by the defendant has been openly asserted by him, and fully known to the city ever since its organization.

"The present case, therefore, is a proper one for the application of the statute, or the principle of repose on which it rests."

We have shown, however, that it is wholly immaterial, *in the case at bar*, whether this "double character" of municipal corporations exists or not.

III.

THE CAUSE OF ACTION SET FORTH IN THE DECLARATION COMES WITHIN THE PROVISIONS OF THE STATUTE OF LIMITATIONS IN FORCE IN THE DISTRICT OF COLUMBIA.

The Maryland act of 1715, chap. 23, entitled "An act for limitation of certain actions, for avoiding suits at law," in force in the District, enacts:

"Forasmuch as nothing can be more effectual to the peace and tranquility of this province than the quieting of the estates of the *inhabitants* thereof, and for the effecting of which no better measures can be taken than a limitation of time for the commencement of such actions, as in the several and respective courts within this province are brought from the time of such cause of action accruing:

"II. *Be it enacted, &c.*, That all actions of trespass, *quare clausum fregit*, all actions of trespass, detinue, sur-trover, or replevin for taking away goods or chattels, *all actions of account, contract, debt, book, or upon the case*, other than such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants, which are not resident within this province, *all actions of debt for lending or contract without specialty*, all actions of debt for arrearages of rent, all actions of assault, menaces, battery, wounding, and imprisonment, or any of them, shall be sued or brought by any person or persons within this province, at any time after the end of this present session of assembly, shall be commenced or sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions of account, *and the said actions upon the case, upon simple contract, book debt, or account, and the said actions for debt*, detinue, and replevin for goods and chattels, and the said actions for trespass *quare clausum fregit*, within *three* years ensuing the cause of such action, and not after; and the said actions on the case for words, and actions of trespass, of assault, battery, wounding, and imprisonment, or any of them, within one year from the time of the cause of such action accruing, and not after."

Kilty's Laws of Maryland, Vol. 1, Act of 1715 Chap. 23, Secs. 1 and 2.

Now, the defendant in error contends that the cause of action set forth in the amended declaration is not embraced in any of the provisions in the foregoing act. This position seems to us wholly untenable. What is the alleged claim or cause of action? It is simply, in the language of the act, "*an action upon the case, upon simple contract,*" arising upon an alleged *implied assumpsit* on the part of the defendant, by reason of the acceptance of its

charter, and the duty thereby imposed, to refund to the plaintiff the money paid out and expended for its use in paving and grading the streets. This it is *and nothing more.* It is plainly within the provisions of the above recited act.

Mr. Wood says:

"The action of *assumpsit*, as it formerly existed as an active remedy, and as it now exists in all the States in substance, though not in form, was comprehended under the head of *trespass on the case*, and embraces all causes of action for the recovery of damages for the breach of any simple contract, oral or written, or expressed or implied. (p. 43.) It lies for money accruing under a statute, unless the statute provides another remedy." (p. 45.)

Wood on Lim. of Actions, pp. 43, 45.
Pawlet *v.* Sandgate, 19 Vt., 621.

But the General Term, in its opinion upon the demurrer, takes the position that the character of the claim involved in the suit is such as to render the plea of the statute inapplicable; that the action is *upon a statute*, and is not, therefore, within the act of limitations.

Mr. Justice Hagner says: "But the suit is not brought upon a '*simple contract*' *or contract without specialty*, upon the part of the companies to reimburse the District for the expenditure. It is based upon the obligation on their part, implied by contraction of law, to repay to the District what it has expended for work they were bound to perform *without expense* to the city. If this paving has caused an expense to the District, *their statutory obligation has been broken*, and this fact furnishes the consideration and foundation for the claim for reimbursement. . . . The right of action here grows out of and is founded upon *the obligations in the charters of both the city and the companies, and the suit is an action founded upon these statutes* within the meaning of that term. It has been held uniformly from a period within a few years after the passage of the 21 James I, that *an action upon a statute* was not within the limitations of that act. This was decided in the familiar case of *Taylor* v. *Jackson*, Croke Charles, 513, where it was held that the statute was no bar to an action of debt brought *to recover a penalty* imposed by 2 Edw. VI.,

for removing corn before setting apart the tithes. So, in 1 Saund. 55, *Jones* v. *Pope*, where the action was against the sheriff for an escape under the statute 1 Richard II, ch. 12." (R. 15, 16).

If the doctrine of Mr. Justice Hagner should prevail, in the broad way he states it, it would take the life out of every statute of limitations in the land, for the right of action in every case is, in a certain sense, indirectly based upon a violation of a statute. All the rules of the common law are said to be statutes worn out by time.

Now, we are willing to concede that where a *statute* prescribes a duty to be performed by the defendant, and imposes a *penalty* for the violation of that duty, *and gives a right of action to the plaintiff to recover the penalty imposed*, then the statute is regarded as a *specialty*, as much so as a bond, and is not embraced within the limitations of 21 James I, chap. 16, as that act makes no provision for *specialties*. Thus, in the case cited by Mr. Justice Hagner (*Taylor* v. *Jackson*), the statute of James was no bar to an action of debt brought to recover a *penalty* imposed by 2 Edward VI for removing corn before setting apart the tithes; so in *Jones* v. *Pope* (1 Saund. 55), likewise cited by Judge Hagner, where the action was against the sheriff for an escape under statute 1 Richard II, ch. 12.

Fortunately, the statute of 1 Richard II, ch. 12, though enacted more than 500 years ago, is in force in Maryland and the District (although practically obsolete), so we can lay our hands on it. It is given both in English and in Norman-French in Alexander's British Statutes in Force in Maryland, at page 181. It provides that no warden of the Fleet shall suffer any prisoner, there being *by judgment*, at the suit of a party, to go out of prison without paying the judgment; and if the warden suffer such prisoner to escape, "then the plaintiff shall have his recovery against the same warden by writ of debt."

It may be the law, then, under the statute of James, as well as under the act of limitations in force here, that

where the liability of the defendant is created, not by the act of the parties, but by the direct and positive requirements of a *statute, and a right of recovery is given by the same statute to the plaintiff, he is not barred.*

But there is a distinction between the liabilities directly imposed by a statute, and one simply having relation to it. Mr. Wood, in his able treatise on Limitation of Actions, published in 1883, referring to the provisions of the statute 21 James I., chap. 16, says:

"All instruments under seal, of record, and *liabilities imposed by statute, are specialties* within the meaning of the statute 21 James I., 'without specialty.' It becomes important to know what classes of obligations come under this head, because, under the statute 21 James I., *specialties* are not embraced, and to a great extent such also is the case in the statutes of the several States of this country." (p. 64.) "In all cases where liability is created by the positive requisitions of a statute, *and not by the act of the parties themselves,* the liability is treated as in the *nature of a specialty,* and is not within the statute of 21 James, nor within the statutes adopted in the several States, applicable to simple contracts, unless expressly made by the statute itself." (p. 74.)

"Actions founded *directly upon a statute,* a matter of record, or, in fact, any *specialty,* are not within the statute; *but the rule is otherwise as to actions only indirectly founded upon a statute.* Thus, where an action for use and occupation lies for the recovery of the use of premises, although there is a lease under seal, the statute applies. *So, where a surety upon a bond is compelled to pay money thereon for his principal, the statute runs upon his claim therefor, although it arose out of his own obligation under a specialty.* The statute applies to actions against a sheriff for money collected on execution, and, indeed, *every claim or demand that may be made the ground of an action of assumpsit.*" (pp. 41, 42.)

"And this distinction, to wit, between an *action founded upon and created by a specialty, and one which, although an incident of a specialty, yet rests upon an express or implied promise,* is necessary to be observed, as in the former instance, the statute does not apply, *while in the latter it does.*" (p. 72.)

"It has been held that assumpsit will lie to recover a balance struck, although the account going to make up such balances embraces specialties; and, generally, it may be said *assumpsit lies whenever there is an express promise, or the law will raise an implied promise as an incident of the specialty;* and in such cases the statute runs against the assumpsit, but not against the specialty obligation and remedies." (p. 73.)

"*It is only where the statute creates the liability and is directly the ground of the action that it is exempt from the operation of the statute.*" (p. 75.)

Wood on Limitation of Actions, pages 64, 74, 41, 42, 72, 73, 75.

But, really, in the case at bar, the action is neither *directly or indirectly upon a statute.* It is upon an *implied assumpsit* arising out of a contract created by the acceptance of a charter.

Happily we are relieved from the further discussion of this question by the decision of this court in *Carrol* v. *Green*, 92 U. S., 509. It is on all fours with the case at bar. The syllabus is as follows: "The Exchange Bank of Columbia, S. C., failed in February, 1865. In June, 1872, its creditors filed a bill in equity to enforce their claims against the stockholders under a clause of the charter which, 'upon the failure of the bank,' rendered them individually liable for any sum not exceeding double the value of their respective shares. The defence set up the statute of limitations of 1712, which requires actions *upon the case*, and actions of debt, grounded upon any contract *without specialty*, to be brought within four years. *Held*, that *as the liability of the stockholders arose from their acceptance of the act creating the corporation and their implied promises to fulfill its requirements*, the proper remedy was an *action upon the case*, and as the statute barred such an *action at law*, it was also a good defence in equity."

The act of limitations of South Carolina (1812) and the act in force in the District of Columbia, are almost identical in language (so far as relates to the question under discussion), each having been copied, with some variations, from the statute of 21 James I. The South Caro-

lina act is set out in the opinion of the court in *Carrol* v. *Green*, at page 512. The act in force in the District of Columbia declares:

"That all actions of *account, contract, debt, book, or upon the case* (other than such accounts as concern the trade of merchandise), all actions of debt for lending, *or contract without specialty*, all actions of debt for arrearages of rent, . . . or any of them [which] shall be sued or brought by any person or persons, . . . shall be commenced or sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions of account, *and the said actions upon the case, upon simple contract, book debt, or account*, and the said actions for debt, . . . within three years ensuing the cause of action, and not after; and the said actions on the case for words, . . . within one year from the time of the cause of action accruing and not after."

Kilty's Laws of Md., Vol 1, act of 1715, ch. 23.

Mr. Justice Swayne, delivering the opinion of the court in *Carrol* v. *Green*, 92 U. S., says:

"They (the stockholders) were severally compelled to contribute according to the amount of the stock they respectively held, and the liabilities of the bank to be met, after exhausting its means, the maximum of the liability of each stockholder not to exceed in any event twice the amount of his stock. It is obvious from this statement, that, if there had been a suit *at law* against the stockholders, debt could not have been maintained. The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages. The action of debt is in legal contemplation for the recovery of a debt *eo nomine* and *in numero*. Case, now usually called assumpsit, is founded on a contract express or implied.

"Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to a certainty; *and there was clearly an implied promise on the part of the stockholders.*

"The Legislature created the corporation, and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the State. It

could be accepted or declined. There was no constraint. *By taking the stock the terms were acceded to, the contract became complete, and the stockholders were bound accordingly.* The same result followed which would have ensued under the like circumstances between individuals. The assent thus given, and the *promise implied*, are of the essence of the liability sought to be enforced in this proceeding. *If a remedy at law were necessary, clearly it must have been case.*

"Case is a generic term, which embraces many different species of actions. *There are two, however, of more frequent use than any other form of action whatever; these are assumpsit and trover.* The more legal denomination of the action of assumpsit is *trespass on the case upon promises.* . . . When the Statute of South Carolina of 1712 here in question was enacted, the term *case* was as well understood to embrace *assumpsit* as anything else in the law of procedure to which it is now held to apply.

"But if debt were the proper form of action, if this were a suit at law, the result must be the same. The act bars 'all actions of debt' grounded upon any lending *or contract without specialty;* also 'after the lapse of four years.' *The contract here was of the class last designated. The statute was only inducement. The implied promise of the stockholders to fulfil its requirements was the agreement on their part, and it was without specialty.*

"In *Lindsay* v. *Hyatt*, 4 Ed. Chan., 104, *the act of incorporation declared that the directors and stockholders might be sued for the debts of the corporation either at law or in equity as if they were joint debtors or copartners.* The Vice Chancellor said: 'It appears to me that the six years within which *actions on simple contract* indebtedness must be brought does apply.' Speaking of a *suit at law* he said: '*In such an action the declaration must be in case founded on the statute.* . . . The form of the action and the nature of the liability to be enforced fall within the provisions of the statute which takes away the right to sue after six years.'"

Mr. Justice Swayne then cites *Corning* v. *McCullough*, 1 Comst., 58 (1 N. Y.); *Baker* v. *The Atlas Bank*, 9 Met., 182, and *The Commonwealth* v. *Cochituate Bank*, 3 Allen, 42, in support of his position. Speaking of *Baker* v. *The Atlas Bank*, he says:

"This was a bill in equity founded upon a statute making the stockholders liable in the cases specified. The defendants relied upon the statute of limitations, which declared that 'all actions founded upon contract or liability *not under seal* shall be commenced within six years next after the cause of action shall accrue, and not afterwards.' It was held that the statute applied in equity as well as at law, and that after the lapse of six years the bar was complete.

"It is insisted by the learned counsel for the appellees, that while the limitation act of 1712 provided that 'actions of debt upon any lending or contract, *without specialty*,' should be brought within four years, it did not limit actions of debt *upon specialties*; and that the liability here in question, *being created by a statute*, is to be regarded as falling within the latter class. It is said that an obligation to pay money *arising under a statute is a debt by specialty*. In support of this point, *Bullard* v. *Bell*, 1 Mas. 243, has been pressed upon our attention. Fully to examine that case would unnecessarily extend this opinion. It was cited in *Baker* v. *The Atlas Bank*, and in *Corning* v. *McCullough*, *without effect*. We think it distinguishable from the case in hand in several material points. If it be in conflict with the cases to which we have referred in this connection, we think the results in the latter were controlled by the better reason."

Now, an analysis of the amended declaration will show that the action is based upon an *implied promise* to repay to the plaintiff money paid by it in consequence of the neglect of the defendant to discharge a duty imposed upon it by its charter. The action is not to enforce the performance of this duty by the defendant, but it alleged it failed to perform the duty, and that thereupon the plaintiff performed it, and the defendant impliedly promised to pay the cost of such performance. Suppose the promise to repay had been express, and the plaintiff was suing upon such promise, would it be pretended that such action was upon a specialty? Certainly not; and yet there is no difference between an implied and express promise in this respect.

IV.

MUNICIPAL CORPORATIONS ARE COMPREHENDED UNDER THE GENERAL TERM "PERSON OR PERSONS" AND "INHABITANTS" IN THE ACT OF LIMITATIONS IN FORCE IN THE DISTRICT OF COLUMBIA.

"A corporation," says Mr. Kyd, "is a *political person*, capable, like a natural person, of enjoying a variety of franchises." (1 Kyd, 15.)

In *School Directors of the Township of St. Charles* v. *Georges* (50 Mo. 94), the court say:

"Unless municipal corporations are excepted from the statute of limitations, they are comprehended under the general term '*persons*.'"

COMSTOCK, *Ch. J.*, in rendering the opinion of the court in *The People, &c.*, v. *The Rector of Trinity Church* (22 N. Y. 44, 57), says:

"I have only to observe, further, that *we entertain no doubt* that a corporation is a 'person' within the *meaning of the statute of limitations*, and may avail itself of the defence."

In *The People, ex rel, The Attorney-General* v. *The Utica Insurance Company*, 15 Johns. (N. Y.), 358, the court say:

"But although the restraining act does not, in terms, include *incorporated companies*, by expressly declaring that no corporation, unauthorized by law, shall become a member of, or connected with, any banking company, yet the term *persons* there used will embrace incorporated companies in the prohibition. It was decided by this court, in the case of *The Clinton Woolen and Cotton Manufacturing Company* v. *Morse & Bennet*, (October Term, 1817,) that under the act for the assessment and collection of taxes, corporations are liable to be taxed for property owned by them, yet the act speaks only of *persons* liable to be assessed, *and the term corporation is not used at all.* So also in England, a corporation seized of land in fee, for their own benefit, are considered *inhabitants* or occupiers within the meaning of 42 Elizabeth, ch. 2, and liable in their corporate capacity to be rated for the poor tax. (Cowp. 73.) And Lord Coke, in his exposition of the statute 22 Henry VIII, ch. 5, for the repair of bridges,

commenting on the word *inhabitants*, with respect to what words are included under that description, says, *every corporation and body politic* having lands, &c., are *inhabitants* without the purview of the statute. (2 Inst. 703.) If corporations can, under the term *inhabitants or persons* be subjected to the same burthens to which individuals are subject in the same character, they may also, very properly, under the same term, be included within the prohibitions in the restraining act."

It will be observed that the preamble to the Maryland act of limitations recites that the object of the act is, the quieting of the estates of the *inhabitants* thereof.

A corporation has been deemed *a person* within the meaning of the attachment laws of Alabama. (Planters' Bank *v.* Andrews, 8 Port., Ala., 404.)

V.

THE ACTION IS NOT BROUGHT TO RECOVER A PUBLIC TAX OR ASSESSMENT, LEVIED UNDER AUTHORITY OF LAW, OR ANYTHING ANALOGOUS THERETO.

This proposition, it seems to us, is too plain for argument, yet as Mr. Justice Hagner has treated of the matter in his opinion, we will consider it briefly.

The Justice says that the municipality has full power to exact from *property owners adjacent to the improvement a* contribution in reimbursement of the cost, in proportion to their respective properties. Before collecting these contributions the municipality usually ascertains the aliquot part to be paid by the individuals by an *assessment;* and such charges or assessments are in the nature of taxes or public duties respecting streets and avenues; that the imposition of such assessments is, in fact, the levy of a tax, and is made in the exercise of the taxing power; that such assessments constitute liens upon the property of individuals subject to charge, and are entitled to priority of payment out of the proceeds in advance of all other claims, and such paving assessment liens are unaffected by the statute of limitations.

To all of which we yield a ready assent.

"*But*," says the Justice, "*in the present case there has been no regular assessment against these companies.*"

This is undoubtedly true.

"But," continued Mr. Justice Hagner, "these companies occupy, as to this statutory duty of paving, the same position with respect to the statute of limitations that they would hold if the amount chargeable against them for paving had *been made the subject of a regular assessment*, which they refused to pay."

Here we differ *in toto* from the court. To our mind there is the widest difference between an action brought to recover a tax or local assessment which is by law a lien or charge upon contiguous property, and an action to recover upon an *implied assumpsit*, to refund money laid out and expended for another's use. In the one case the statute of limitations may not be a bar, in the other it certainly is.

VI.

The Cause of Action accrued more than Three Years before the Commencement of the Action, as appears upon the Face of the Amended Declaration.

The amended declaration alleges that *all* the grading and paving done by the plaintiff, and for the cost of which the action is brought, was "*completed and finished by the plaintiff*" between the years 1872–'5. (R., 25–28.) The suit was commenced November 27, 1880. (R., 2.) So that the cause of action did not accrue within three years before suit brought.

The Supreme Court of the District, in its opinion on the demurrer, admits that the cause of action did not accrue within three years.

But it may be contended by the plaintiff that the cause of action arose, *not from the completion of the work*, but from the time the itemized account was presented to the defendant and payment thereof refused, namely, February 25, 1880. (R., 28.) This position is wholly untenable. *No demand for payment was necessary.*

When money is paid for another, under such circumstances that the law will imply a promise to repay it, and no time is fixed for its repayment, *the right of action accrues at once.*

Wood on Lim. of Actions, p. 325.

When a contract was entered into to build a ship at an agreed price, and afterwards the ship was built larger, but without any further agreement as to the time of payment for the extra labor, it was held the statute began to run *as soon as the work was completed.*

Peck *v.* Steamship Co., 5 Bosw. (N. Y.) 226.

Where money is paid by one person for another, and no time is fixed for payment, the statute attaches from the date of payment.

Wood on Lim. of Actions, p. 321.

Bowman *v.* Wright, 7 Bush. (Ky.) 375.

See Hitt *v.* Shorer, 34 Ills., 9.

VII.

In the course of the trial of the cause, a mass of documentary evidence, consisting of contracts, schedules, entries in the books of the Board of Public Works, and correspondence with the officers of that Board, was introduced by the defendant in error. The real issues under trial were thereby greatly obscured.

There will be found in the record numerous exceptions relating to the admission in evidence of this immaterial and irrelevant matter, but in view of the considerations already presented, it seems unnecessary to particularize or discuss them.

VIII.

The judgment of the court below should be reversed with costs.

W. D. DAVIDGE,
NATH'L WILSON,
of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. ~~266.~~ 24

THE METROPOLITAN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT.

A. G. RIDDLE, *Attorney, District of Columbia.*

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 266.

THE METROPOLITAN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT.

A. G. RIDDLE, *Attorney, District of Columbia.*

THE CASE.

The District, January, 1881, sued the plaintiff in error, on certain statutes to be quoted, for $153,000, the cost of certain work and material by the District for the Metropolitan Railroad Company, in the repairs of its portion of certain streets occupied by it in the city of Washington during the years 1871, '72, and '73.

The Company denied its liability and plead the three-years' statutes of limitations. To this the District demurred. The hearing of this demurrer brought up the merits of the case, which were broadly considered and ruled upon by the

court, which sustained the case and the demurrer. Opinion by Justice Hagner. (Rec., pp. 8 to 23, 1st Mackey, 361.)

Under suggestions, the court gave leave to amend the declaration, which was done by increasing the claim to $161,000, with slight changes in its frame and phraseology. (Rec., pp. 23–28.)

To this the Railroad Company filed twelve pleas, including its two pleas of limitations. The special pleas are really but the general issue—useful only as indicating the company's several special points. The District took issue on these ten, and renewed its demurrer to the pleas of limitations (Rec. pp. 29–33), which was sustained. (Rec., p. 33.)

The parties thus at issue were sent to a jury April 14, 1884. The District recovered a verdict for $147,507. (p. 34.)

Numerous exceptions were taken by the Company, plaintiff in error, to rulings upon evidence, and instructions to the jury given and refused. (See the copious bill of exceptions, pp. 35–64.) The case on these was fully reviewed on all points, except the statute of limitations, in general term, June 15, 1885, and the court below sustained. (4 Mackey, 214.) Opinion by Justice Cox.

For a revision of this final judgment on this record the parties are before this court.

NOTE.—The case of the District *vs.* The Washington and Georgetown Railroad Company was heard with this in general term at each trial.

THE STATUTES INVOLVED.

The Metropolitan Railroad Company was chartered July 1, 1864. (13 Stats., p. 326, Record p. 65.)

Appended to section first is this—

"*Provided*, That the use and maintenance of the said road shall be subject to the municipal regulations of the city of Washington within its corporate limits."

The act did not contemplate its extension into Georgetown.

SEC. 4. *And be it further enacted*, That the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington.

SEC. 5. *And be it further enacted*, That nothing in this act shall prevent the Government at any time, at their option, from altering the grade or otherwise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such grade and pavement.

SEC. 6. *And be it further enacted*, That this act may at any time be altered, amended, or repealed by the Congress of the United States.

The act of February 21, 1871, abolished the corporation of Washington (16 Stats., 419). It, however, made the District of Columbia, under the new government, the successor of the city of Washington (sec. 96, Rev. Stats., D. C.).

The thirty-seventh section of said act created a Board of Public Works, with various powers and duties, and, among other things, provided:

"The Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be entrusted to their charge by the Legislative Assembly or by Congress."

Sec. 77, Rev. Stats. D. C.
See also Sec. 74 to 84, *Id.*

These are the statutory provisions which created the relations between the parties to this suit, by the duties imposed on the Railroad Company in reference to the streets it occupied under its charter and the broader supervisory duties imposed upon the Board of Public Works in reference to the same and all other streets; the Board must not only make the regulations, but must enforce them as well.

The proof of the work done by the District as laid in the declaration, was the amplest. It gave in evidence the District act of appropriation, with the whole scheme of improvement, a proclamation to all (Ex. F., p. 74 to 94); also its award and date of contracts for work on the streets involved (Ex. G, p. 95); its correspondence with the Railroad Company (pp. 41-53); also Exhibits H and I (p. 96.)

It was made to appear that all the work was done under contracts which covered the entire street from curb to curb (p. 37).

The District proved that the railroad company changed the grade of its tracks on its own motion as the work progressed, and that, while it claimed the right to do the paving, it made no effort to do it—never offered to do it—did not protest against its being done by the District; but its attitude was acquiescent (pp. 55, 56.)

And thus arises—

The Broad Question of the Case.

Can the District recover its expenditure in this behalf?

By the acceptance of its charter the Railroad Company undertook to do this work as the exigency might arise. When that exigency came it did not do it. The District, in the discharge of its duty to the public, had to do it. Shall it now recover its reasonable cost from the derelict company?

Turning for brief study of the Company's charter we find its use and maintenance are subject to the city regulations. This confers not only police control, but authority to enforce its legal claims by such means as may exist, though I do not rest this case here—it is to be borne in mind, however.

The Company's duties are sharply defined in sections 4 and 5. It is to keep the chartered space at all times well paved and in good order. The limitless power to change the grade of streets, mode of pavement, as also the material, is fully reserved to the Government and also to the city. To the Government, as retaining the care of the avenues—to the city, which cared for the streets; and, when such changes are ordered, the company is to conform to the new grade and the new pavement and this without expense to the United States or to the city of Washington. Nothing can be more certain and explicit.

The confiding grantors of the charter seem to have expected, in view of the vast and ever growing favors conferred, that the company would always be eager to perform its duties. The charter provides no means for their enforcement. It carefully guards the United States and the city from all expenses on account of them and leaves the parties to find the appliances of enforcement elsewhere.

Turning to the powers of the Board of Public Works we find the avenues as well as the streets were placed in its care, with plenary and exclusive authority to keep them in repair.

Of the costs incurred for the improvement of the streets the Board had power to assess upon all *adjoining* property a part not exceeding *one-third.* (Sec. 151, Rev. Stats.; 37 sec. Act of 21 Feb'y, 1871; 16 Stats., 423.) This assessment to be made as might be prescribed by the laws [of the District Legislature.]

The act of August 10, 1871, was passed by the District Legislature to give effect to the above. The first section is as follows:

"That whenever any of the improvements mentioned or referred to in section thirty-seven of the act entitled 'An act to provide a government for the District of Columbia,' approved the twenty-first day of February, one thousand eight hundred and seventy-one, shall be completed, a statement of the cost thereof shall be prepared by the Board of Public Works, and be filed in the office thereof, and immediately thereafter an assessment, based upon said statement, shall be made, as provided for in said section of said act, which assessment shall be collected by the said Board in the same manner as other taxes of the District of Columbia are now or may hereafter be authorized to be collected."

It is believed that, save certain provisions of the city charter and ordinances in force authorizing the assessment of the costs of street improvements upon abutting property per foot front, the above comprise all the provisions upon this matter, and it is seen that the Board was armed with no specific power to enforce its claims against the plaintiff in error.

The dues from the Railroad Company were strictly in the nature of special taxes, and as such a certain portion of improvement costs were to be assessed upon private property.

The law authorized the Board to assess one-third only of the cost of a given improvement, the exclusive work of the District, upon private property. The Company's charter obliged it to pay the whole cost of its designated portion.

The Board could only assess adjoining, abutting, fronting property. The Company's property in no respect met this description.

Clearly there was no law by which this charge could in a legal

sense be assessed and enforced upon the property of the plaintiff in error, and hence our right to sue and recover at law. I do not care what the action is called. There is ample space to turn it into the desired form to meet the nicest legal taste. The declaration is drawn so as to present no difficulties in the way. I only contend that the law charged the Railroad Company with the duty of these repairs. It charged us with the duty of seeing that the Company made them. Made us responsible for them. The Company did not perform its duty. We performed for the Company. It refused to pay us. We are without other remedy, and so we pray judgment here.

Mr. Justice Hagner disposed of this question in this very satisfactory manner (1st Mackey, 380), which I offer as argument:

"Can an action be maintained at law to recover back what the District has been compelled to pay on the default of the companies to perform the work described in the declaration?

"Assuming the obligation to be in force, it would seem too plain for argument that a right of action in some form must exist. For we can scarcely regard as serious the contention of counsel for the roads that the only available remedy in the case of default would be an application for a mandamus to compel the company to do the work, or the suing out of a *scire facias* to deprive them of their charters for neglect of their charter obligations.

"A municipality that would leave the track of a railroad company refusing to comply with a required change of grade at a dangerous elevation or depression, while it was following an action of mandamus through the different courts on appeal, instead of at once performing its plain duty of making the requisite changes to insure the public safety, would deserve a punishment more severe than the inevitable public censure. It would have no option in such a case, but would be forced to perform the omitted work. That the

negligent party should be made to repay the expense would be only a scant measure of justice.

"We will refer to a few cases in support of the right of action under such circumstances.

"In 45 Penna., 137, Town of Phœnixville *vs.* Phœnixville Iron Co., an action was brought by the town to recover from the company the amount it had expended for the repair of a bridge crossed by the defendant's railroad and also by foot passengers, which had been built at joint expense, but which the defendant refused to repair. Judge Strong, speaking for the court which sustained the town's right to recover, notices that the defendant's charter authorized them to *construct* the bridge and cross it with their railroad, but says nothing of *repairs;* but he adds: 'It is a fair presumption the Legislature never intended to give away public rights or to impose burdens upon any local community without compensation. This is a continuing obligation upon the company to keep up the bridge.'

"In 46 Pa., 224, Penn. R. R. Co. *vs.* Duquesne Borough, the town brought an action to recover back the sum it had expended in rebuilding a bridge across a canal which had been taken by the railroad company under authority of a law of the State, which declares the company should receive this and the other public works subject to existing contracts respecting them. The canal had erected the bridge originally, and it was insisted that the railroad, as its successor, was bound to repair and rebuild it.

"The court held the action could be maintained, and in their opinion used this language: 'Whenever any person or corporation is bound to repair a public highway and refuses to do so when necessary, on notice by the proper officers having the general oversight thereof, those officers may repair it and recover the proper expense thereof in an action of assumpsit founded on the duty.'

"A case very much like the one before us is reported in 44 Wisconsin Reports, 238, City of Ocato *vs.* Chicago & N. Western R. R. Co. By the general statutes a corporation making a railroad is required to restore any street it may pass through to its former condition, and thereafter maintain the same in such condition against any effects thereafter produced by the railroad. Nothing is said in the law as to who should defray the cost of the repairs, nor of any action to recover their cost. The defendant, after constructing its road through the city, though requested by the authorities, neg-

lected to restore the streets and sidewalks to their former condition. The common council, which under the charter had full authority over the streets, procured the necessary repairs to be made and the city paid for them, and it was held it could recover from the railroad company all reasonable expenses so incurred."

I also adopt from the opinion of Mr. Justice Cox, in the final hearing, the following passages from 4th Mackey, pp. 227–'29:

"It is substantially an action to recover money paid, laid out, and expended by the District for the use of the defendant at its special instance and request.

"The general rule, as we know, is that a past and executed consideration is not sufficient to sustain even an express promise. Therefore if I pay money for another man, without any request from him, even his promise to pay has been held insufficient for this past executed consideration. But wherever the money is paid on the request of the party benefited, the right to recover does exist. That request may be either expressed or implied. The general rule is stated in Wait's Actions and Defences, cited on the part of the defendant in argument. At page 449 of volume 4 of that work it is said:

"'An action of assumpsit for money paid by one person for another can only be maintained when it was paid in pursuance of a request from such person, express or implied, so that either an expressed or implied promise to repay the same can be predicated thereon.'

"Again, on page 453:

"'In order to entitle a person to recover for money paid for another, a request, express or implied, must be established, or an express promise to repay it, and it may be said that, in all cases where there is a legal obligation on the part of the person paying to pay the money, the primary obligation resting upon the person for whose benefit it was paid, the law implies a request and a consequent promise that will uphold an action to recover it back.'

"Now, what is the relation between the District and the railroad company? In the case of Barnes *vs.* The District of Columbia, it will be remembered that the Baltimore & Potomac Railroad Company, in crossing certain streets

within the limits of the city, left a dangerous excavation, down which the plaintiff fell, and he brought an action for the injuries he had sustained. The main question there was whether the acts or neglects of the Board of Public Works were chargeable to the District, but the important principle established in that case, as applicable to this case, was that the District of Columbia is responsible for the condition of its streets, and is bound to see that they are kept in good condition, and where a railroad company is authorized to construct its road in a street or avenue, the District is the company's surety for the safe condition of its streets, and cannot be absolved from obligation.

"The District of Columbia—the Board of Public Works at that time—was bound for the proper paving of the streets, bound in the relation of a surety to the railroad company, on whom primarily the obligation rested. Now, in the cases which are put in the books, it is not necessary that any notice be given, or demand first made, upon the principal before the surety's right accrues to pay the debt, and then to recover the money paid on account of the principal. The very fact that the obligation has not been discharged by the principal is, in itself, sufficient to entitle the surety to pay the debt, and then reclaim the money from his principal. It is upon this ground, we think, that this defendant not having done or offered to do the work, and the District being responsible for the condition of its streets, the District should proceed at once to do the work as surety, and then claim the money from the defendant, who is primarily responsible for the condition of the street, upon the implied promise to refund the money.

We recognize the rule which was recognized by the court at special term, that if the company chose to do the work they might do it, and they might have enjoined the District authorities from interfering with them, but if they fail to offer to do it, fail to notify the District authorities, then there was that condition of things which would authorize the District to do the work at its own immediate expense, but at the ultimate cost of the defendant, and to reclaim the money from the latter."

Also from p. 230, *Id.:*

"It has been claimed that this was money paid under a mistake of law, and the general rule has been insisted upon

that money paid under a mistake of law cannot be recovered back. According to the view we have taken there was no mistake of law, as the District had a right to do the work and charge it to the defendant. The general rule as to money paid under a mistake of law has no application to this case. That rule is, that if I pay money under the mistaken impression that it is my duty to pay it—that it is my debt—and I discover afterwards that I was not bound to do it, I could not recover the amount so paid from the party to whom paid. Accordingly, if the District authorities had paid this money to a contractor for work that the District was not bound to do, it could not recover the money from the contractor. But if the District could not recover it from the defendant in this case, it would not be upon the ground that it was paid under a mistake of law, but because it was paid by the District without any previous request of the defendant, express or implied. But, independently of that, it is doubtful how far such a rule could have application to public officers. If a public officer undertakes to pay the public money under the mistaken impression that it was his duty to do it, it would not relieve the person really owing it from the obligation to pay it."

As bearing on this question I cite—

Brooklyn vs. *City Railroad Co.*, 47 N. Y., 475.

Ill. Central R. R. Co. vs. *Bloomington*, 76 Ill., 447.

THE SPECIAL DEFENSES OF THE COMPANY.

The Railroad Company filed some twelve pleas, and submitted twenty-eight legal propositions, all referable to four or five points. They all rest on its theory of the case, and fail if the case of the District is based on the law.

I.

The Company asserts that under its charter, the streets being paved when it took possession, its duty was discharged when it kept its allotted space well paved and in good order,

keeping the same kind of pavement. (See its two rejected offers of proof, pp. 54 and 55.) All of the pavement laid by the District, before the Company was in possession of the streets, was new, and therefore not chargeable to it.

This was its claim before the Committee of Congress, and its reply to the demand of the District. Can more be needed to show the fallacy of this claim than a return to the provisions of the statutes? Clearly when the company's track was to be maintained "subject to the municipal regulations of the city of Washington" it cannot be contended that the company had the right to designate the kind and mode of pavement in opposition to such regulations. The Board of Public Works was placed in control of the whole street with power, at discretion, to make these "regulations," change grades and pavements, and it is the especial duty of the company at all times to conform to grade and pavement and keep its allotted portion well paved and in good order without expense to the District. No other rule can be practicable and secure uniformity. This defense of the company is clearly unwarranted.

The case of *The Pitts. & Birm. Railroad Company* vs. *Birmingham*, 51 Penn., 41, it is believed fully sustains our view.

II.

As to the work on certain streets counted on in the declaration—East Capitol, Ninth streets, Connecticut avenue, and others—it is claimed by the Company that it is not liable therefor because it contends that when it laid its iron rails, its track, the pavement by the District was completed. The point is covered by the Company's nineteenth prayer, page 62. The facts appear at page 38, the Company's offer pages 54

and 55, and the correspondence of the parties in reference to this matter pages 41, 42, 43, 44, 45, and 53.

The facts are, that when the Board's contractors were upon these unpaved streets the Company asked permission to place its ties and stringers in position, as the work progressed, in advance of paving. This was accorded and they were so placed. In the last letter asking permission the Company coupled with its request that the paving was to be at the cost of the District (p 53). This was not assented to, nor could the Board so assent.

Potentially, with its ties and stringers in place, the Company's track was on the street, and its duty attached. It was a great servitude—an obstacle, imposing its charter obligation, no matter when the rails were laid. The charter does not limit its duty to its power to use its tracks. It may never use them. The privilege granted to it was a large advantage. To permit it to escape the cost of the pavement which it would have been compelled to break up and relay, would be to reduce its course in the premises to a device to escape an obligation.

On this point I adopt a paragraph from the opinion of Justice Cox, 4 Mackey, 234.

"Now, it seems to us that, as this company had elected to construct their road in the street, and have the use of the pavement which the Board was laying down, and complete their road after the pavement was completed, that this process of constructing their road was to be treated as one thing; that they could not divide it up so as to get the benefit of the pavement that the Board was laying, and yet avoid the charge that the law imposed upon them when they constructed their road simultaneously with the work done by the Board, and that when they did use and occupy the street for the purpose of their railroad, they should reimburse the Board for the paving that was done for their benefit; that when Mr. Thompson said that they were willing to lay their

stringers and cross-ties, 'provided the paving be done without charge to us,' he should have said, 'provided, that when the road is completed, and when we occupy the street hereafter, we will reimburse you for the work you are now doing.'"

These propositions deny that under its charter the Railroad Company was chargeable with the cost sought to be enforced against it.

III.

The residue of the Company's points concede that it might have been charged with this cost; that under its charter it was liable to the duty named, but that the District, ignorant of the law and careless of its duty, so managed and mismanaged that it expended this full sum of $147,500.05 for the use and benefit of the company and cannot recover any part of it. This large sum, in law, became a gratuity from the District to the company.

First. Under this head the claim is that it was the duty of the District to give the Company a special notice to do this work, with time and space to perform it in, and thus by its act put the Company in default; that failing in this the suit fails. This point seems mainly relied on by the plaintiff in error, that although this was the especial duty, an original obligation of the Company voluntarily assumed for its own exclusive performance, still in some inexplicable way its liability depended on special notice by the District.

a. Clearly under its charter the Company was entitled to no express notice. The only condition to charge it is a want of repair—repavement, regrade—no matter how that arises. Its charter makes it a supervisor, a conservator, of

its part of the street. It must take notice and be ready at its peril. If change of grade requires special notice, then must it have this notice to repair its own injury to a street. The declaration alleges that it *had notice, not* that the plaintiff gave it such notice.

Congress has twice dealt with this matter outside these railroad charters, once in the act of July 8, 1870, for paving Pennsylvania avenue. It said in the 3d section of that act that the Washington and Georgetown Railroad Company should have the right to pave its charter part of the street, under the direction of the Commissioners, created by it, but it was to use the same material, in the same manner and simultaneously with the other work; otherwise the Commissioners were to do it and the company to pay. (16th Stats., 196.) Not a word is said about making a demand on the Company to do it, give it time, and then in default do the work; nor was an act of Congress necessary in the premises. This was the inevitable law of the case under the charter of the Company.

The act of June 11, 1878, sec. 5 (creating the District government, 20 Stats., 105), reiterates the charter liability of a railroad company to provide for the cost of its portion of a street, does not say the Commissioners shall give it notice, make a demand, give it time, nor does it imply that. The company is to take notice at its peril; and if it shall *neglect* or refuse to perform the work required, then the Commissioners shall do it and charge the company.

b. I claim, as I have shown, that by the defendant's pleas and prayers it denies its liability to do the work sought to be charged upon it, under any possible circumstances. This was its main defense in the court below. (See 1st Mackey,

314.) This was its claim to Congress and to us always, first and last and is urged now. It does not lie in its mouth to say it had no notice to do what in advance it disclaims as a duty.

c. I show that the provision which compelled it to change its grade obliged it to pave between its tracks and compelled it to pave this twice two exterior feet. *That it took notice* and *found the time* and opportunity to change its grade—all its grades—the record shows (p. 37). This certainly is conclusive of this thing of special notice.

In the face of these its acts, it is estopped from saying it had no notice to do these things.

d. I urge further that it had actual notice, as shown by the record. It was in daily correspondence and intercourse with the Board of Public Works as the work began and advanced (pp. 36, 41–53).

e. The Company never claimed, in fact, that it had no notice—no opportunity—until called to pay by this suit.

f. When part of the costs were assessed against it, it did not then claim that it had no notice, no time, nor did it then demand time and space for the future work, as it might arise (Rec., 56). It did not offer to do the work (*Id.*)

g. Finally, under proper instruction as to what constituted notice, the jury found that fact for the plaintiff below.

Second. The District was bound by the seeming construction of the powers. It excluded the defendant from the performance of its duties under its charter; became a volunteer; and service and money thus bestowed are a gratuity, for which no right of action exists (see Rec., p. 61).

A people may lose their rights, have their money and property squandered beyond recovery by the mismanagement, the malversations of their rulers. But if their agents, without color of law, without authority, part with money or property, the party in possession of it is without right, holds it by wrong, and it may be recovered. There is no question of making one's self the creditor of another without his consent. He has consented to take it by wrong, and is merely a trustee for the rightful owner, and must account.

Not only was there no authority to do this work, chargeable upon the Company as its debt, its express liability—voluntarily, as a gratuity in fact—but section 53, Revised Statutes of the District of Columbia, expressly forbids it.

If the Board of Public Works paid or delivered $147,500 of the District to the Company in flagrant violation of law it certainly can be recovered back. It was money had and received for the District's use.

In this case it did $147,500 worth of work, furnishing material, and may under these statutes recover it by this special action. The Company was present aiding, abetting; knew that the money of the District was being expended for it; did not forbid it, did not protest against it, but took it with full knowledge.

Can it refuse to refund it?

Third.—Under this head falls the claim of the Company that the three assessments of the Board against the Company and sold to the First National Bank of New York (p. 61–62) were ratified by the act of June 19, 1878, are outstanding in the hands of the bank, and therefore their sum cannot be recovered in this suit.

On recurrence to that act (vol. 20, p. 166) it is seen that

it refers specially to assessments made under the act of the District Legislature of August 10, 1871, quoted from above at pp. 6 and 7. We find that these assessments could not be made under that nor any law, and are void.

In conclusion of this matter I may say that more and more courts are striving to do the right, recognize and enforce equities.

Such is the spirit of many cases.

See Marsh *vs.* Fulton Co., 10 Wall., 676.
Hitchcock *vs.* Galveston, 96 U. S., 341–343.
Chapman *vs.* County of Douglas, 107 U. S., 348.

Clearly these two last cases cover our case.

See also Arquiti *vs.* San Francisco, 16 Cal., 282.
Morville *vs.* American Tract Society, 123 Mass., 129–137, par. 2, Colt's opinion.
Campbell *vs.* District of Columbia, 2 MacArthur, 533.

The cases are numerous that where a party is in possession of money or property which it is inequitable he should retain, it may be recovered by the rightful owner.

IV.

There remains the Company's pleas of three years' statute of limitations of Maryland of 1715, ch. 23, in great part taken from that of 21 Jac. I.

To this limitation the District objects:

That this suit is really by the United States;

That it is brought on the statutes named;

That the claim in character is for a tax.

It is true the court below (1st Mackey, 361) did not sustain my first objection, but it sustained my demurrer, and I submit I am at liberty to ask this Court to pass upon this point also.

By reference to the acts of June 20, 1874 (18 Stats., 116,) and June 11, 1878, (20 *Id.*, 102), it is seen that the so-called municipal corporation is a pure fiction, is a device by which the United States, by its own officers and agencies, governs the people of the District, enacts and enforces all their laws, assesses collects and disburses the District revenues, and performs all the acts of its government. It is a municipal corporation without corporators or corporate officers.

The proceeds of this suit will be the money of the United States.

Upon the other two points made I beg to adopt as my argument the opinion of Mr. Justice Hagner, from 1st Mackey, beginning on p. 372, Rec., p. 15:

> The question next arises whether there is anything in the character of the claim involved in this suit which renders the plea of the statute of limitations inapplicable as a bar to the action.
>
> The claim grows out of an obligation imposed upon the companies by the United States, and assumed by them when they accepted the charters, under the authority of which alone they can claim any right to occupy the streets of the city and operate their roads.
>
> By this requirement, contained in the 4th section of each charter already quoted, the companies are bound to keep their track and the adjacent part of the street described *at all times well paved, and in good order, without expense* to the United States and to the cities named.
>
> It was one of the few conditions imposed upon them when they received their valuable franchises. It did not, *as of course*, result from the grant; for Congress might have agreed to dispense with it. Nor was it necessarily incident to the business of carrying passengers, since a large omnibus company might possibly make more extensive use of the streets

in general without incurring any liability to pay for paving any part of them. But it is wholly a statutory provision, and the liability imposed, therefore, is wholly statutory.

After the acceptance of their charters they could not be heard to object that the provision was illegal, or incapable of enforcement against them. 17 Hun. (N. Y.), 242; New York City *vs.* Steel Railway Companies.

This duty, it is alleged, they refused to perform, and the work was done and paid for by the District, which now seeks reimbursement in this action. Upon the plain words of the statute it seems clear to us it is not within the enumeration in the first section of the act of limitations of 1715, ch. 23. It is not "an action of account," or "upon the case, upon simple contract, book debt, or account," or "of debt for lending," or of "contract without specialty," or "of debt for arrearages of rent;" nor is it one of the other enumerated actions, as "assault," &c.

If it be either of the enumerated actions it could only be an action upon one of the classes of *contract* referred to. But the suit is not brought upon a "simple contract," or "contract without specialty," upon the part of the companies to reimburse the District for the expenditure. It is based upon the obligation on their part, implied by construction of law, to repay to the District what it has expended for work they were bound by statute to perform *without expense* to the city. If this paving has caused any expense to the District their statutory obligation has been broken, and this fact furnishes the consideration and foundation of the claim for reimbursement. Apart from the obligation upon the District to take all proper care of the streets, imposed by statute, and the duty of the companies arising under their charters to see that this work is done *without expense* to the municipality, the action could not be maintained, for the unauthorized payment of money by one party for another creates no legal liability upon the latter to repay. But the right of action here grows out of and is founded upon the obligation in the charters of both the city and the companies, and the suit is an action founded upon these statutes, within the meaning of that term.

It has been held uniformly, from a period within a few years after the passage of the 21 James I, that an action upon a statute was not within the limitations of that act.

This was decided in the familiar case of Taylor *vs.* Jackson, Croke Charles, 513, where it was held that the statute

was no bar to an action of debt brought to recover a penalty imposed by 2 Edw. VI for removing corn before setting apart the tithes. So in 1 Saund., 55, Jones *vs.* Pope, where the action was against a sheriff for an escape under the statute 1 Rd. II, ch. 12.

And this doctrine has been repeatedly applied by the courts in Maryland in cases arising under the act of 1715, ch. 23.

Such was the ruling in 2 H. & McH., 145, French *vs.* O'Healey, that an action founded on a statute cannot be barred by limitations, as debt for an escape.

So in 1 Gill, Longwell *vs.* Riginder, 57, it was held that a distress for rent in arrear based upon statute is not within the statute of limitations.

And in 2d Maryland, 19, Newcomer *vs.* Keedy, it was held in 1852, on the same ground, that limitations is no defense to an action on the case against a sheriff for a false return to a *fi. fa.*, because the officer is made answerable for such misconduct by force of an ancient statute.

So it was held in 2 Md. Ch. Dec., 213, Bond *vs.* Harris, that bonds given by an heir, electing to take part of the ancestors' land and pay their shares to the other heirs, in conformity with the statute for partition of land, are not within the Maryland statute of limitations.

So in 14 Johns., Peace *vs.* Howard, 479, which was an action on a judgment rendered by a justice of the peace, the court say: "The statute (of New York) is not a bar to every action of debt, but only to those brought for arrearages of rent or founded on any contract without specialty. Debt on indenture reserving rent is not within the statute. The settled construction of the statute is that it applies solely to actions of debt founded upon contracts in fact, as contradistinguished from those arising by construction of law." In the present case the action is not founded upon a contract in fact within the meaning of the statute.

But there is a further and conclusive reason why this action should not be held to be within the statute of limitations.

The municipality is charged with the entire custody of the streets and avenues of the city, and endowed with the amplest powers to pave and repair them, to change the grades, or otherwise improve them, and make all necessary regulations to this end. And it is perfectly settled that this is a continuing power, to be executed whenever it shall see

instruction that if the paving for which the claim was filed was paid by the city more than six years before the assessment was made, the claim of the city was barred by the statute of limitations. The court refused the prayer, and this ruling was sustained by the appellate court, which says: "The statute of limitations has no application to assessments under the acts, and the objection is grounded upon a misapprehension of the powers of the Legislature."

In the present case there has been no regular assessment against these companies. But the obligation imposed upon them by law, and which they have assumed by their acceptance of the charters, is to perform their contract duty with respect to the public streets without any such assessment or levy as might be required in the case of holders of property abutting on the streets improved by the District. They have bound themselves, as part of the consideration for their franchise, to pave the designated parts of the streets *for themselves*, and any previous assessment by the District would be an idle and senseless ceremony. They knew exactly how much they were required to pave, and that they were to pay for it; and they had nothing to do except to perform the work "*without expense* to the United States or the District of Columbia." The assessment could have told them nothing not already known to them; and the District of Columbia could not have made the assessment, if required to do so, without obtaining the information from the company.

These companies, therefore, occupy, as to this statutory duty, the same position with respect to the statute of limitations that they would hold if the amount chargeable against them for paving had been made the subject of a regular assessment, which they refused to pay, and for the recovery of which this action was brought. For those reasons we are of the opinion that the claim as presented is not obnoxious to the plea of the statute of limitations, and we decide the demurrer is well taken to the second and third pleas of the defendant.

On all the points I submit the judgment should be affirmed.

A. G. RIDDLE,
Attorney for the District of Columbia.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 24.

METROPOLITAN RAILROAD COMPANY, PLAINTIFF IN ERROR,

versus

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

HENRY E. DAVIS,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS.

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METROPOLITAN RAILROAD COMPANY, PLAINTIFF IN ERROR,

versus

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

This is an action at law brought by the District of Columbia in the supreme court of the District against the Metropolitan Railroad Company to recover the cost incurred by the District in doing certain paving of the company's tracks, which, as is alleged, the company should have done but failed to do; whereupon the District did the work and claims to be reimbursed by the company.

The amended declaration (Rec., 23) makes the following allegations in substance:

(1.) The District is a municipal corporation under the laws of Congress, charged with the duty of taking charge of and improving the streets, &c., of the cities of the District of Columbia.

(2.) The company is a body corporate by act of Congress authorized to construct a railroad in certain of said streets,

intended, as the court below held, that the railroad should conform to the new pavement.

But the matter is set at rest by the language of the act of June 11, 1878 (20 Stat., page 106), cited by counsel for the company (page 35 of brief), in which Congress, under the reserved power of amendment, &c., makes more stringent the obligation of the railway companies to pave, &c.; and, having evidently in mind the very provisions of the fifth section of this company's charter, proceeds: "But the said companies, having conformed *to the grades* established . . . may use such cobble-stone or Belgian blocks for *paving* . . . as the Commissioners may direct." This reflects the clearest light upon the provisions of the charter. It shows conclusively that it was to both grades and pavement that the company was formerly to conform, and while giving the company the privilege of selecting a material of two, it yet retains to the municipal authorities so much of the former power as is necessary to supervise the selection. This is an unmistakable legislative construction of the charter as it stood before the passage of that act.

a. A subordinate question is made whether the liability to pave must await "the completion of the construction of the railway by laying the tracks, including the rails" (Brief, pp. 42–'3). But for the space devoted to it by counsel (pp. 42–'7) it might well be doubted that this question is seriously made. The contention is that the company, seeing the municipal authorities about to make improvements involving the laying of a pavement, might construct its road with the single exception of putting on the rails, await the laying of the pavement, and then by delaying the putting on of the rails throw upon the municipality that expense (of the pavement), from which the charter says that the municipality is to be free. The court below properly held that the constructing the road was to be considered as an entirety, and that the company could not divide up the construction

so as to get the benefit of the pavement and yet avoid the charge that the law imposed upon it. (4 Mackey, p. 234.)

2. The second principal question presented by the company is whether a demand by the municipality and refusal by the company to discharge its charter obligations are essential to recovery in this action.

The argument for the company is, in effect, this: *First*, the duty prescribed by the charter, namely, to keep the prescribed spaces well paved and in good order, was imposed upon the company, and is to *do* the work, not to pay the District for doing it; the District could not by assuming to do the work change the legal position of the company; and if, without demand by the District and refusal by the company to do the work, the District did it, it did it under circumstances involving neither a request, express or implied, by the company to do the work nor a promise to repay the District the cost incurred; *secondly*, the exception that when there is a legal obligation on the part of the person incurring the cost, but the primary obligation rests upon the person for whom the cost was incurred, the law implies a request to incur the cost and a consequent promise to repay, has no application to this case, because there was no obligation upon the District to pave the prescribed spaces; and, *thirdly*, that as between the company and the District there was no such relation of surety as to absolve the District from the necessity of demand before itself doing the work.

a. The first branch of this argument wholly ignores the question of neglect or default on the part of the company. It is not pretended by the District that if the company had undertaken to do the prescribed work it could have been interfered with in any other wise than as respects supervision of the paving in relation to grade and character of pavement. But the company does not claim that it offered or undertook to do the work and was thereupon interfered with; and it not having done so the question reverts, What was necessary

on the part of the District to charge the company with liability for the cost of what the District did?

It is said (on page 50 of counsel's brief) that the cases of *Penn. R. R. Co.* vs. *Duquesne Borough*, 46 Pa. St., 224; *Phœnixville* vs. *Phœnix Iron Co.*, 45 Pa. St., 137, and *Oconto* vs. *Chic. & N. W. R'y Co.*, 44 Wisc., 231, show the necessity of demand in order to charge liability in such a case as this. It is true that in those cases there was notice or demand, but the question of necessity of such was absent from each, and in none of them was presented the question what constitutes demand in contemplation of law.

That actual, express demand was necessary cannot successfully be contended. That the company knew its duty in the premises and the necessity of doing it is sufficient. In *Brooklyn* vs. *Brooklyn Railroad Company*, 57 Barb., 497, the company gave bond to the city, in consideration of the privilege of laying its tracks on certain streets, to keep in thorough repair the pavements of such streets within the tracks and for three feet on each side thereof "under the direction of such competent authority as the common countil may designate." The company failed to keep one of the streets in repair, in consequence of which one Meier sustained injuries for which he recovered judgment against the city. The city sued the company for the amount of the judgment, and the company claimed that as no competent authority had been designated to superintend the keeping of the street in repair it was not liable. But the court held that the claim was untenable, saying (p. 501):

"The work was prescribed; the time when and the manner how it was to be done was stipulated in the contract. The defendants were to keep the streets in repair at all times, within the tracks and three feet on each side thereof, with the best water stone. The defendants not only knew exactly what they were to do under the contract, but how and when they were to do it.

"The substance of the contract on the part of the defendants was to keep the pavement at all times in repair, and not to do the work on the pavement *when directed by the city*

authorities. This obligation became operative, at all times and under all circumstances, whenever the pavement got out of repair, and the qualification that the work of repairing was to be done under the plaintiff's authority related only to the manner of doing the work and could not affect the time of doing it, in the absence of a positive restriction not to do it at a particular time."

This ruling was affirmed on appeal (47 N. Y., 475), the court, Folger, J., saying (p. 478–480):

"There is nothing left by the contract so indefinite or uncertain as to extent, as to time, as to mode, as to material, or as to place as that there should be any reasonable doubt as to just *when and where and upon what the defendant was called upon to act.* . . . There is a distinction between this contract and that in *Coombe* vs. *Green* (11 M. & W., 480), and in the cases kindred to it. In that there was something left indefinite, not located or selected, and to be determined by the will of the covenantee, so that the covenantor could not know, until that will was expressed, upon just what his money and his labor were to be applied."

In the case at bar the company, seeing the work going on, knowing the obligations of its charter, actually conforming its road to the altered grades, and, from the correspondence of the Board of Public Works, knowing, or being put on inquiry as to, every requirement in the premises, was obliged, without more ado, to meet the situation and to do the prescribed work; and, failing to do it, the obligation accrued to the District to do it; for, the Board of Public Works being charged with the repair and control of the streets and having determined upon their improvement with specified pavements, could not stop half-way in its work to await the pleasure of the company.

The facts are very clear that the company knew that the work of paving the streets was ordered and was going on, as indeed it was under the company's eyes; that it knew the obligations of its charter; that it knew the character of pavement being laid and the time when and place where it was required to be laid; and that it yet stood by and suffered

the District to pave the prescribed spaces. The law, as above stated in the New York case, absolves from the necessity of demand in such a case, and the acquiescence of the company in the District's doing the work raises the implication of a promise to repay the cost.

b. The second branch of the argument overlooks the fact above alluded to, that the Board of Public Works, having entered upon the work, was under a legal obligation to complete it, so as to protect the community. Even admitting, for the sake of argument, that the board was not obliged as of course to pave the streets, it yet remains true that, having resolved to do so, it could not half do so without incurring liability to all using the streets for any damages sustained in the premises.

c. The third branch of the argument rests in a misapprehension. There can be no doubt that, having control of the streets with the company under its regulation as to use and maintenance of the tracks, and being responsible accordingly for injuries arising out of improper maintenance of the tracks, the District, as to third parties, stood as surety for the company; and that in such relation it was not bound to give the company notice or make demand upon it as an essential to any ultimate liability on the company's part, all the cases hold.

3. It is next contended (p. 51 of brief) that the District "interpreted its powers and did the work at its peril. Its mistake of law could not make the plaintiff in error its debtor."

Numerous cases are cited in supposed support of the position thus taken.

Homestead Co. vs. *Valley R. R.* (17 Wall., 166), as the extract given shows, was a case in which a claimant of land who was defeated sought to recover of his successful adversary taxes paid during the litigation. The court held that a person making a payment in alleged ignorance of the

very law he was engaged in testing could not recover the amount paid.

In R. R. Co. vs. *Soutter* (13 Wall., 517) second mortgagees had bought a railroad on execution, and to prevent a sale of the road under the first mortgage paid the debt secured thereby. Subsequently the sale made to the second mortgagees was set aside as fraudulent and void, and it was held that the second mortgagees could not recover back, as paid under a mistake of *fact*, the moneys so paid to the first mortgagees.

In *Radick* vs. *Hutchins* (95 U. S., 210) a payment to officers of the Confederate States government to redeem certain cotton, under circumstances involving contribution to the support of the enemy, was held not involuntary in the sense entitling the person paying to recover the amount paid.

R. R. Co. vs. *Commissioners* (98 U. S., 541) was a case of payment of taxes under an error of law, and it was held that the tax-payer could not recover the amount paid.

In *Regan* vs. *Baldwin* (126 Mass., 485) a lessee, under provision that in case of damage by fire so as to render the premises unfit for use the rent should be proportionately abated until restoration, paid, on the demand of the lessor, full rent after such damage, and was held not entitled to recover the excess paid because he had paid it in full knowledge of the facts.

In *Black* vs. *Ward* (27 Mich., 191) it was held that a note made in Michigan and payable in Canada, "in Canada currency," is payable in money and negotiable; that the words "in Canada money" were superfluous; and that the maxim "ignorance of the law excuses no one" did not affect the question.

In *Detroit* vs. *Martin* (34 Mich., 170) payment was made to prevent what would have been a void sale for taxes and which would not have cast a cloud upon title, and it was held voluntary and the amount paid not recoverable.

In *Mayor* vs. *Hughes' Ad'r* (1 G. & J., 498) the court distinctly declared that "the defendant's intestate was under

no legal obligation imposed by the ordinance to pay for paving done" by the municipality, and the payment could not be recovered.

In *Mayor* vs. *Lefferman* (4 Gill, 425) Lefferman had paid for the erection of a wall under a void law, and it was held that he could not recover the amount thus paid under a mistake of law.

As was justly said by the court below, the principle of these cases, namely, that he who pays money under a mistaken impression that it was his duty to do it cannot recover the amount so paid from the person to whom paid, has no application to this case. This is a case in which on default of a railroad company a municipal corporation has borne expense which the company should have borne and is asking reimbursement. There has been no mistake of law in the case; the mistake of law could only exist in case the District supposed itself bound to do the work and pay for it when in point of law it was not so bound; but, as is contended above, it was so bound and there was no mistake in its acting on that assumption.

4. It is claimed for the company that certain acts of Congress ratified assessments upon the company for a portion of the work done by the District, and that, if anything, those assessments and not the claim asserted in this action must be enforced.

It need only be pointed out that the very acts cited (pp. 53–'4 of the brief) provide for the correction of erroneous assessments, and that the assessments in question were erroneous cannot be questioned, and in due course they were corrected, and to all intents and purposes they never existed.

5. The measure of damages is said to have been erroneously given by the court. The court's ruling (Rec., 64) was, in effect, that the jury should not consider itself bound by what the company, with its instrumentalities, might have

done the work for, but should consider the reasonable expense incurred by the District, with its instrumentalities, &c. It is confidently submitted that when one body of limited capabilities is compelled to do what should have been done by another body with greater capabilities, the latter is not to have the benefit of consideration of those greater capabilities which it neglected to utilize.

6. The main reliance of the company is on the statute of limitations.

a. First, it is said that the District is a municipal corporation.

What is a municipal corporation? This Court has answered in unmistakable language:

"A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but *a department of the State.* The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State and at others those of a municipality, but that, *its character and nature remaining always the same,* it is great or small according as the Legislature shall extend or contract its sphere of action."

Barnes *vs.* Dist. Col., 91 U. S., 544–'5.

Such being the character of a municipal corporation, how can it be correctly claimed that such a body, "a department of the State," is amenable to a statute of limitations? If the State is not so amenable how can one of its departments, in the absence of express provision, be so? Especially how can it be so when it is a department of the highest sovereignty, the United States?

The District of Columbia is truly "a corporation in name only." It has no corporators; it has no taxing power; it has no officers of its own creation; it has no powers not subject to the immediate supervision and control of the high power of which it is less than an arm—a mere finger. (18 Stat., 116; 20 Stat., 102.)

The District stands, therefore, in the nearest conceivable relation to the sovereignty creating it, and partakes of that sovereignty more than any other known body of like character.

b. But, it is said, numerous cases have been decided holding a municipal corporation liable to the bar of statutes of limitations.

Many such cases are cited in the brief for the company. They have all been examined with care, and every one of them (with a single exception, *Kennebunkport* vs. *Smith*, 22 Me., 445) is a case in which the municipality sought to deprive its adversary (in every instance but one an individual and in the excepted instance, *North Hempstead* vs. *Hempstead*, 2 Wend., 109, a sister municipality) of real estate held in open, notorious, adverse, and exclusive possession for the statutory period. In the Missouri cases it appears that that State had expressly renounced the prerogative of exemption from the bar of limitations; and in the Connecticut case the decision was controlled (as said in 12 West Va., 57) by a statute of Connecticut limiting the pulling down and removing encroachments on highways to the period of adverse possession asserted. Two of them, those in 24 Iowa and 12 West Va., were cases of imperfect dedication of land, with possession of which the original owner had never parted. And the true principle of all of them is stated by the court in 4 Dev., 568:

"The rights delegated to the counties by the State do not, in our opinion, exempt the remedies by action of the counties from the operation of the act of limitations. *We mean remedies for rights or things, which rights or things have been claimed or held adverse to the county.*"

In the Iowa case, much relied upon by counsel, the court, Dillon, J., after remarking that municipal corporations have been held within the statutes the same as natural persons, saves the distinction by adding (page 294):

"Whether there may not be some limitations on this general doctrine arising out of *want of knowledge* of the public corporation or its officers *of its rights* or of the *adverse right sought to be asserted* against it we need not stop to examine; for in this case the right claimed by the defendant has been *openly asserted* by him *and known* to the city since its first organization."

The learned writer of the opinion in this case states the true distinction in his treatise on municipal corporations, sec. 675, 3d ed., cited in part by counsel (on page 65 of brief). But counsel omit an important part of what the author says, as follows:

"It will, perhaps, be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. *The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle.* But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case to hold the public estopped or not as right and justice may require."

The same doctrine is held in the case of *Simplot* vs. *Chicago, &c., Co.* (16 Fed. Rep., 350), quoted from by counsel (page 65 of brief).

This doctrine may be thus stated, that where a municipal corporation is seeking to enforce some right belonging to it in a private or proprietary sense it may be defeated by force of the statute of limitations; but where it is seeking to enforce a right in respect of which it represents the public or

the State, or the right pertains to sovereignty, the statute has no application.

The distinction between the two classes of cases is not difficult of exposition, but it is not necessary in this case to do more than to examine the particular right asserted in the action; for such examination will show conclusively that that right has in no sense a private or proprietary feature, but is conspicuously a right in respect of asserting which the District represents the public, indeed, the very sovereignty itself.

It is the oft-declared law of this Court that the fee of the streets of the city of Washington is in the United States.

Van Ness *vs.* Washington, 4 Pet., 232.
Potomac Co. *vs.* Upper Potomac Co., 109 U. S., 672.
Edmonds *vs.* B. & P. Co., 114 U. S., 453.

In respect of control and care of these streets Congress is the supreme authority, by force of the Constitution of the United States, and it has created an agent by which it exercises this control and care. The company plaintiff in error is given a valuable franchise, of which one of the conditions is that it shall keep a certain portion of the streets paved and in good order, subject to the regulation of the Congressional agency in control of the streets. This action alleges that the company failed to do what its obligation imposed upon it in respect of the streets, and that, as matter of duty under the law of its creation and in the public interest, the Congressional agency did it and now asks reimbursement. A clearer case of representing the public cannot well be conceived.

c. The case presents another feature affecting the question of limitations which is not noticed by counsel for the company.

Where demand is necessary to the action, the statute of limitations does not begin to run until such demand. There has been some wavering in the enunciation of this doctrine,

but it must now be considered settled. It is true that demand must be made within a reasonable time, but what is a reasonable time depends upon the circumstances of each case. In this case the amended declaration distinctly declares upon a demand made within three years before action brought, and the reasonableness in time of the demand thus alleged is not questioned. If it were questioned the question would be determined by facts not in the record.

Wood on Lim., secs. 117–'8 and notes.

When demand is necessary in such actions as this is clearly settled. The rule is that when the subject-matter of the action lies peculiarly within the knowledge of the plaintiff, demand is necessary; otherwise when it lies equally in the knowledge of the defendant.

Lent *vs.* Padelford, 10 Mass., p. 238.
Watson *vs.* Walker, 23 N. H. (3 Fost.), 471.
Lamphere *vs.* Cowen, 42 Vt., 175.

In the case at bar the District's right is to recover what it paid on the company's account. The facts of payment and of the time and amount thereof were peculiarly within the knowledge of the District, and until demand was made by the District the company could not know what to pay. Accordingly the statute, if it runs at all against the District, runs from the time of such demand.

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